Supreme Court, U.S.

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No. 98-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

FULL GOSPEL TABERNACLE and JORGE VEGA,
Pastor of Full Gospel Tabernacle,

Petitioners,

v.

COMMUNITY SCHOOL DISTRICT 27, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a school district violate the First and Fourteenth Amendments to the U.S. Constitution when that district denies a community group equal access to the use of its facilities during nonschool hours for the sole reason that the intended use, while otherwise permissible, may be characterized as "religious services or religious instruction"?

2. Is a policy governing use by community groups of school district facilities during nonschool hours unconstitutional under the First and Fourteenth Amendments, when that policy

   -- allows "instruction in any branch of education, learning or the arts" but forbids "religious instruction," and

   -- allows "social, civic and recreational meetings or other uses pertaining to the welfare of the community," as well as "discussing religious material or material which contains a religious viewpoint and . . . distributing such material," but forbids "religious services"?

PARTIES

The caption of the case contains the names of all of the petitioners. Petitioner Full Gospel Tabernacle is a corporation. It has no parent or subsidiary companies. *See* S. Ct. Rule 29.6.

In addition to the parties listed in the caption to the case, the following were defendants-appellants in the court below and are respondents here:

> COMMUNITY SCHOOL BOARD 27 OF THE CITY OF OZONE PARK; MICHAEL WEITZ, in his official capacity as Principal of Public School 105 Queens; SHEILA McELHATTEN, in her official capacity as Secretary to the Director of Operations; BRENDA ISAACS, in her official capacity as Community Superintendent of Community School District 27; KENNETH L. GROVER, in his official capacity as Deputy Superintendent of Community School District 27; JAMES EGAN; DONNA MARIE CALTABIANO; ERNEST BROWN; SHALOM BECKER; JAMES G. ADAMS; RICHARD J. ALTABE; GERALDINE CHAPEY; STEVEN GREENBERG; JAMES SANDERS, JR., in their official capacity as members of Community School Board 27; and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF NEW YORK.

The Attorney General of the State of New York was an intervenor-defendant-appellee in the court below and is a respondent here.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Full Gospel Tabernacle and Jorge Vega, plaintiffs-appellants in the court below, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case at bar.

DECISIONS BELOW

All decisions in this case to date are entitled Full Gospel Tabernacle v. Community School District 27. The decision of the district court granting summary judgment to respondents (defendants-appellees below) is reported at 979 F. Supp. 214 (S.D.N.Y. 1997). App. B.[1] The order of the Second Circuit denying en banc consideration is unpublished. App. C. The decision of the Second Circuit affirming summary judgment is reported at 164 F.3d 829 (2d Cir. 1999). App. A.

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[1] "App." refers to the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued the decision for which petitioners seek review on January 25, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix D. The text of New York Education Law § 414 is set forth in Appendix E. Excerpts of the pertinent school district policy are set forth in Appendix F.

STATEMENT OF THE CASE

In New York State, school districts by statute are authorized to make their facilities available to outside users when not in use for school purposes. See N.Y. Educ. Law § 414 (App. E). Respondent Community School District 27 ("CSD 27" or "the District") implements this statute through the Standard Operating Procedures Manual (SOPM), which sets forth regulations for use of school facilities during nonschool hours. The SOPM provides in part as follows:

> 5.6 In addition to the use described in items 2.11, 5.3 and 5.5, school premises may also be used for the following purposes:
>
> 5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

> 5.6.2. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

App. 33a. The SOPM also provides as follows:

> 5.9 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

App. 34a (emphasis added).

CSD 27 has approved thousands of applications for use of its school facilities. Among the applicants allowed use of school facilities (and the corresponding approved uses) are the following:

- American Legion ("County Convention Awards Assembly");
- ARYA SAMAJ USA, Inc. ("Cultural Evening");
- Dance Dimension ("Dance Recital Rehearsals");
- Department of Sanitation ("Basketball");
- Belle Harbor Property Owners Association ("Board of Directors Meeting");
- Rockaway Action ("Mural Painting")
- Mercaz Hatorah ("Basketball Program");

- Congressman Shumer ("Town Hall Meeting");
- Queens Kiwanis ("Girls Softball Team");
- Tappin-Feet ("Dance Recital");
- LWG Co-op Inc. ("Shareholders Meeting");
- Local 372 ("Union Meeting");
- IUOE Local 30 ("Union Meetings");
- Eye of Tiger Karate ("Karate Tournament"); and
- Creative Arts ("Gospel Cantata").

App. 6a n.3. Religious groups, including churches, are eligible to use school facilities during nonschool hours. CSD 27 has approved the use of its facilities, for example, by St. Mary's Church ("Biddie-ball"), Church of St. Paul ("Gospel Choral Performance"), New Hope Baptist ("Gospel Recital"), Salvation Tabernacle ("Sacred Concert"), Rabbi Shlomo Volner NCFJ ("Purim Party"), and Way Of Life Gospel Center ("Gospel Recital"). Id.

Until approximately the end of 1994, CSD 27 also approved the use of its facilities for religious services, including Bible studies and religious services by the Deliverance Temple Church and worship services by the Jesus Family Fellowship Church. App. 6a-9a.

Petitioner Full Gospel Tabernacle ("the church") is a church that in early 1994 was meeting in a building owned by the church in Far Rockaway, New York. At that time Robert Castro, a plaintiff below, was the pastor of the church.[2] In late April 1994, because church membership exceeded the capacity of the church's building, the church decided to seek an

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[2] Petitioner Jorge Vega subsequently replaced Castro as pastor and was substituted for Castro as a plaintiff in this case. App. 4a n.1.

alternative location for Sunday worship services. App. 5a.

On May 6, 1994, Pastor Castro applied to use CSD 27 facilities during nonschool hours in June for the Sunday services of Full Gospel Tabernacle. On May 16, 1994, respondent Kenneth L. Grover, Deputy Superintendent of CSD 27, wrote Pastor Castro a letter denying the application and quoting the following portion of SOPM 5.9:

> No outside organization or group may be allowed to conduct religious services or instruction on school premises after school.

Pastor Castro applied once more, seeking use of CSD 27 facilities for Sunday services in July, 1994. Respondent Grover, this time by telephone, in June of 1994, again denied the application. App. 5a-6a.

Pastor Castro retained counsel for himself and the church, and counsel sought to resolve the matter informally with school officials. The pertinent school officials gave no substantive response for months, asserting that the matter was being given the "utmost consideration." See Ex. D to Complaint (letter from attorney for Chancellor of Board of Education of the City of New York).

Meanwhile, CSD 27 began clamping down on the use of its facilities for worship services. The District rescinded a permit issued for the Jesus Family Fellowship, on July 21, 1994, after five biweekly services, citing SOPM 5.9. The District also halted the year-old use of CSD 27 facilities by the Deliverance Temple Church, in November of 1994, again as the enforcement of a ban on worship services. App. 7a-9a.

Pastor Castro and Full Gospel Tabernacle filed suit on November 2, 1994, in the U.S. District Court for the Southern District of New York. The suit named as defendants CSD 27 and various school district officials. Jurisdiction was based on 28 U.S.C. §§ 1331, 1343. Castro and the church sought injunctive and declaratory relief, alleging a violation of their rights under the First and Fourteenth Amendments to the U.S. Constitution. Castro and the church challenged the constitutionality of both SOPM 5.9 and N.Y. Educ. Law § 414, the proffered authorities for denying the church equal access to school facilities during nonschool hours.[3]

On November 28, 1994, Castro and the church moved for a preliminary injunction granting them equal access to CSD 27 facilities. The Attorney General of New York intervened in defense of the constitutionality of New York Education Law § 414 and in opposition to a preliminary injunction.

In April of 1995 Castro and the church moved for summary judgment. At the same time, petitioner Pastor Jorge Vega sought leave to substitute for Castro as plaintiff because Vega had replaced Castro as pastor of Full Gospel Tabernacle. CSD 27 cross-moved for summary judgment.

On September 24, 1997, the district court denied petitioners' motions for a preliminary injunction and for

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[3] Section 414 does not by its terms forbid religious instruction or worship during outside uses of school facilities. A New York appellate court, however, construed section 414 to authorize use only for "enumerated purposes" and held that because uses for "religious purposes" are not listed in the statute, no such uses are authorized. Trietley v. Board of Educ., 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978).

summary judgment and granted summary judgment for respondents CSD 27, et al. Full Gospel Tabernacle v. Community School Dist. 27, 979 F. Supp. 214 (S.D.N.Y. 1997) (App. B).

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit. Because that court had recently rejected a similar claim by a church seeking equal access to school facilities, see Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998), petitioners moved for en banc consideration. That motion was denied. App. C. On January 25, 1999, the Second Circuit affirmed, in a brief per curiam opinion, adopting the reasoning of the district court. Full Gospel Tabernacle v. Community School Dist. 27, 164 F.3d 829 (2d Cir. 1999) (App. A).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a governmental body may deny a community group equal access to the use of its facilities -- here, school district rooms during nonschool hours -- for the sole reason that the intended use, while otherwise permissible, may be characterized as "religious services or religious instruction."

There is no question that the respondent school district, CSD 27, has opened its facilities, pursuant to statute (N.Y. Educ. Law § 414) (App. E) and policy (SOPM 5.6 & 5.9) (App. F), to use by private groups. Churches and religious organizations are admittedly eligible users. Religion is undeniably a permitted topic. See SOPM 5.9 (App. F) ("the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or

material which contains a religious viewpoint or for distributing such material is permissible"). Permissible uses also undisputedly include all the secular components of religious worship and instruction, such as singing, dancing, meeting, giving honor to someone or something (e.g., the "County Convention Awards Assembly"), cultural exercises, sharing concerns, discussing literary works, and making presentations. Respondent CSD 27 only bars uses of this type which have a particular religious dimension, i.e., uses that, according to CSD 27, are characterized as "religious services or religious instruction."

Thus, for example groups may use CSD 27 facilities to study the Scriptures,[4] but not if they do so from the perspective of believers.[5] They may sing religious hymns for musical entertainment, but not for the worship of God. They may hold ceremonies to honor the Mayor, but not the Maker.

Such blatant anti-religious discrimination violates the U.S. Constitution in multiple respects. Infra § II. By upholding this flagrantly unconstitutional discrimination, the Second Circuit stands in conflict with every other federal circuit to consider the issue. Infra § I.

This Court should grant review.

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[4] SOPM 5.6 & 5.6.1 provide: "school premises may be used . . . [f]or the purpose of instruction in any branch of education, learning or the arts . . . ."

[5] SOPM 5.9 provides: "No outside organization or group may be allowed to conduct . . . religious instruction on school premises after school."

I. THE DECISION OF THE SECOND CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit upheld in this case the discriminatory exclusion of religious worship and instruction as such from equal access to governmental facilities. This ruling conflicts with decisions of the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits:

- **Fourth Circuit**: School board may not deny equal access to churches wishing to use school facilities for regular Sunday services. Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir.), cert. denied, 511 U.S. 1143 (1994) (holding unconstitutional, under Free Speech and Free Exercise guarantees, policy imposing up to five times higher rental rate on plaintiff church).

- **Tenth Circuit**: Policy denying equal access to government facilities for "sectarian instruction and worship" impermissibly restricts the viewpoint of would-be speakers. Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), cert. denied, 519 U.S. 949 (1996). Court explicitly rejected argument that ban on all sectarian instruction and religious worship was a viewpoint-neutral limit on subject matter. 84 F.3d at 1279.[6]

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[6] See also Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983) (school district may not deny church equal access to its facilities for worship or other religious purposes); Shumway v. Albany County School Dist. No. One Board of Educ., 826 F. Supp. 1320 (D. Wyo. 1993) (school board may not deny equal access

- **Eighth Circuit**: School district may not deny equal access to its facilities to outside group wishing to engage in prayer, Bible reading, religious songs, and speeches. Good News/Good Sports Club v. School Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995). Court explicitly rejected argument that religious speech is a separate excludible category. 28 F.3d at 1506-07 & n.8.

- **Third Circuit**: School district may not deny equal access to school facilities for religious services and distribution of literature. Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir.), cert. denied, 498 U.S. 899 (1990).

- **Fifth Circuit**: Policy denying equal access to government facilities for "religious purposes," such as plaintiffs' prayer meetings, violates First Amendment. Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989).

- **First Circuit**: School district may not deny equal access to school facilities for "direct advancement of religion." Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991).

- **Seventh Circuit**: Government may not deny equal access to its facilities, including school buildings, for religious uses. See Grossbaum v. Indianapolis-Marion County Building Auth., 63 F.3d 581 (7th Cir. 1995) (invalidating exclusion of menorah from nonpublic forum lobby where other private displays were allowed); Hedges v. Wauconda

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to its facilities for baccalaureate service).

Community Unit School Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) (overturning discriminatory ban on student distribution of religious literature);[7] Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) (upholding neutral restrictions on student distribution of literature).[8]

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[7] See id. at 1297-98:

> [N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time. . . . Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. . . . Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.

[8] See id. at 1543-44 (citations and editing marks omitted):

> [S]peech cannot be suppressed or discriminated against solely because it is religious. . . . Banning religious expression, which the Free Exercise Clause of the First Amendment singles out for protection, . . . solely because it is religious is per se unreasonable.

See also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional); cf. Air Line Pilots Ass'n Int'l v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995) (striking down exclusion of ad from nonpublic forum display diorama). As the Seventh Circuit explained in Air Line Pilots, in assessing whether viewpoint discrimination exists, the "inquiry cannot be

In addition, district courts in the Ninth and Eleventh Circuits have held unconstitutional the denial of equal access to school facilities for religious services. See Wallace v. Washoe County School Dist., 818 F. Supp. 1346 (D. Nev. 1991) (church's Sunday services); Verbena United Methodist Church v. Chilton County Board of Educ., 765 F. Supp. 704 (M.D. Ala. 1991) (baccalaureate service).

Against this uniform line of authority, the Second Circuit stands alone.[9] This Court should grant review to resolve this conflict.

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evaded by retreat to the category of speech allegedly banned (here, 'political')." Id. at 1159. "Instead, the proper focus concerns whether or not the forum has included speech on the same general subject matter." Id. at 1160.

[9] The Second Circuit is stubborn in its refusal to allow equal access for religious users. See, e.g., Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (denying equal access to student Bible club), cert. denied, 454 U.S. 1123 (1981), overruled, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School Dist., 959 F.2d 381 (2d Cir. 1992) (denying equal access to church wishing to show film with religious perspective), rev'd, 508 U.S. 384 (1993); Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) (denying equal access to church for worship services), cert. denied, 118 S. Ct. 1517 (1998). Absent definitive review by this Court, the direct conflict between the law in the Second Circuit and in every other circuit will persist.

II. THE DECISION OF THE SECOND CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT.

The Second Circuit has condoned the discriminatory exclusion of petitioners' intended activities because of the religious dimension of those activities. The incompatibility of this ruling with the precedents of this Court could scarcely be clearer. Indeed, the ruling below flies in the face of this Court's jurisprudence under four distinct constitutional guarantees: free speech, free exercise, establishment, and equal protection.

A. The Free Speech Clause

Religious worship, like other religious speech, is constitutionally protected. Widmar v. Vincent, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment") (and cases cited). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.

Id. (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination against religious speech, including worship. Id. at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993); Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint"). Viewpoint-based discrimination -- the most egregious form of content-based censorship, Rosenberger, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. See Lamb's Chapel, 508 U.S. at 390-92; Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, no forum analysis is necessary to invalidate such censorship. Lamb's Chapel, 508 U.S. at 391-92.

In the present case, petitioner Full Gospel Tabernacle is an eligible user of school facilities, religious matter is an eligible topic, and gathering to sing, speak, learn, and celebrate are eligible uses. Respondent CSD 27 nevertheless excluded the church's expressive activities solely because the use would entail a forbidden perspective -- that of a believer offering worship to God. This is unconstitutional viewpoint discrimination, yet the Second Circuit upheld the exclusion. The Second Circuit ruled that there is a constitutionally decisive distinction between religious speech and worship. App. 21a n.9; id. 24a. But this Court has squarely rejected this very distinction as constitionally unsound, unworkable, and irrelevant. Widmar, 454 U.S. at 269 n.6.

B. The Free Exercise Clause

The Free Exercise Clause forbids the discriminatory restriction of religious activities. Such a restriction targets speech or conduct because it is religious and thus strikes at the very heart of the constitutional protection of religious freedom. Employment Division v. Smith, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.
>
> . . . .
>
> . . . There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of the law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993). See also McDaniel v. Paty, 435 U.S. 618 (1978).

In the present case, CSD 27 excludes worship because it is a religious ritual. The component activities -- gathering, singing, speaking, celebrating, and so forth -- are not otherwise objectionable uses. Just as in Lukumi, the government could

not forbid only religiously ritual slaughter of animals, so here CSD 27 cannot forbid only religiously ritual assemblies. Yet the Second Circuit condoned CSD 27's targeted exclusion of religious ceremonies and instruction.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). Accord Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory suppression of religious activities "would demonstrate not neutrality but hostility toward religion." Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990). Accord McDaniel, 435 U.S. at 641 (Brennan, J., concurring in judgment) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion").

Moreover, discriminatory suppression of religious services and instruction requires the censor to make a judgment about what is and is not religious. This creates additional constitutional problems of "entanglement":

> [school officials] would need to determine which words and activities fall within "religious worship and religious teaching." The alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure

compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).

Thus, treating religious expression on equal terms with secular expression "would in fact avoid entanglement with religion," Mergens, 496 U.S. at 248 (emphasis in original; citation omitted).

In the present case, CSD 27 denies equal access precisely for those activities which it deems to be religious services or instruction, regardless of whether the intended use would otherwise be permissible. This is the antithesis of neutrality. Moreover, the policy at issue requires government officials to identify "religious services" and "religious instruction" by private groups in order to enforce the policy of exclusion. Government agents are thus compelled to classify the activities of privates citizens according to their perceived religious purposes. See, e.g., The Good News Club v. Milford Central School, 21 F. Supp. 2d 147, 154-58 (N.D.N.Y. 1998) (district court implementing Second Circuit's rule by carefully scrutinizing club's activities to determine whether they constituted forbidden religious instruction or permissible discussion from a religious viewpoint). Even if such a task were workable -- and it is not[10] -- it would be a wholly

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[10] A few examples may help illustrate the logistical and constitutional nightmare this policy of discriminatory exclusion creates.

Under SOPM 5.6.1, "instruction in any branch of education, learning or the arts" qualifies as a permissible use. Under SOPM 5.9, discussion of religious material, including

material with a religious viewpoint, is likewise permissible. But SOPM 5.9 forbids "religious instruction." Thus, one presumably may study the Bible, the Talmud, or the Koran to learn what it teaches. But catechesis is forbidden. How is the line to be drawn? By quizzing the participants on their desire to believe the text? What about a presentation of adult apologetics for a particular religion? Is that forbidden or permitted? What if Christian believers, to enrich their faith, arrange for a course (open to the public) taught by a non-Christian expert on the Dead Sea Scrolls or the Shroud of Turin? What if believing Muslims were to offer a course to the general public designed to dispel myths about Islamic doctrine? or to win converts?

The policy of CSD 27 also requires government agents to identify "religious services." The distinction between a forbidden and a permissible concert of sacred or seasonal music, to give one example, is far from obvious. Secular music fans can presumably gather for Handel's Messiah or a Mass by Beethoven. May the congregation of a local church do so as well? Does it matter whether the church describes the event as a concert or as a liturgical assembly? To take another example, the local chapter of the Christian Legal Society presumably could assemble at CSD 27 facilities to discuss practical issues for lawyers facing moral challenges in the professional world. What if the CLS members open the meeting with a time of prayer or worship? How much prayer is too much? Cf. App. 20a n.7 (inclusion of "opening prayer" and "closing salvation message" apparently was insufficient to trigger CSD 27's ban on religious services).

Considerations like these only reinforce the wisdom of this Court's insistence upon a neutrality that avoids the thicket of

improper role for a government censor. Widmar, 454 U.S. at 269 n.6, 272 n.11.

Despite all these defects, the Second Circuit upheld the discriminatory exclusion at issue here.

D. The Equal Protection Clause

The Equal Protection Clause likewise forbids discrimination against the religious expression of private speakers. "At a minimum," governmental classifications "must be rationally related to a legitimate government purpose," while "classifications affecting fundamental rights . . . are given the most exacting scrutiny." Clark v. Jeter, 486 U.S. 456, 461 (1988).

A restriction on religious speech -- and only religious speech -- obviously represents a classification "affecting fundamental rights," namely, the rights to free speech and free exercise of religion. Hence, strict scrutiny applies. There is no serious contention that some compelling need exists to exclude private religious speech from government facilities open to outside users; therefore, such restrictions are unconstitutional. Indeed, the arbitrary and selective prohibition of religious speech could only "rest on an irrational prejudice," City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985) -- namely, a bias against religion as such -- which would "fail rationally to justify singling out" religious speech for special restrictions, cf. id. Accord Widmar, 454 U.S. at 281 (Stevens, J., concurring in judgment) (perceiving no valid reason to exclude religious worship where comparable secular

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government regulation of religious practice qua religious practice.

discussions are allowed). Yet the Second Circuit upheld CSD 27's arbitrary policy of exclusion of religious worship and instruction.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

In view of the Second Circuit's clear departure from the decisions of this Court and the consistent law of the other circuits, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 16.1.

Respectfully submitted,

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April 26, 1999

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FULL GOSPEL TABERNACLE and Jorge Vega, Pastor of Full Gospel Tabernacle is substituted in place of Robert Castro, Plaintiffs-Appellants,

v.

COMMUNITY SCHOOL DISTRICT 27; Community School Board 27 of the City of Ozone Park; Michael Weitz, in his official capacity as Principal of Public School 105 Queens; Sheila McElhatten, in her official capacity as Secretary to the Director of Operations; Brenda Isaacs, in her official capacity as Community Superintendent of Community School District 27; Kenneth L. Grover, in his official capacity as Deputy Superintendent of Community School District 27; James Egan; Donna Marie Caltabiano; Ernest Brown; Shalom Becker; James G. Adams; Richard J. Altabe; Geraldine Chapey; Steven Greenberg; and James Sanders, Jr., in their official capacity as members of Community School Board 27, and Board of Education of the School District of the City of New York, Defendants-Appellees,

Attorney General of the State of New York, Intervenor-Defendant-Appellee.

Docket No. 97-9235

Argued Jan. 11, 1999. Decided Jan. 25, 1999.

Before: WINTER, Chief Judge, VAN GRAAFEILAND, and KEARSE, Circuit Judges.

PER CURIAM:

We affirm for substantially the reasons stated by Judge Haight in the decision below. *See Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214 (S.D.N.Y. 1997).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Full Gospel Tabernacle and Jorge Vega,

Plaintiffs,

v.

Community School District 27, Community School Board 27 of the City of Ozone Park, Michael Weitz, in his official capacity as Principal of Public School 105 Queens, Sheila McElhatten, in her official capacity Secretary to the Director of Operations, Brenda Isaacs, in her capacity as Community Superintendent of Community School District 27, Kenneth L. Grover, in his official capacity as Deputy Superintendent of Community School District 27, James Egan, Donna Marie Caltabiano, Ernest Brown, Shalom Becker, James G. Adams, Richard J. Altabe, Geraldine Chapey, Steven Greenberg, and James Sanders, Jr., in their official capacity as members of Community School Board 27, and Board of Education of the School District of the City of New York,

Defendants,

Attorney General of the State of New York,

Intervenor.

No. 94 CIV. 7906(CSH)

Sept. 24, 1997.

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge.

Plaintiffs, a church and its pastor,[1] seek access after school hours to a public school located in Community School District 27 to conduct religious worship services. Defendants, the Board of Education of the School District of the City of New York ("Board of Education"), Community School District 27, and certain of its officers and employees, have denied plaintiffs access to school facilities on the ground that N.Y. Educ. Law § 414, and the Board of Education's policy implementing that law, prohibit the use of school facilities for religious worship services. Plaintiffs initiated this suit pursuant to 42 U.S.C. § 1983, alleging that the defendants' policy, and the law on which it is based, violate the First and Fourteenth Amendments to the United States Constitution.

Plaintiffs now move for summary judgment granting them the relief they seek in their complaint, namely, a declaratory judgment and permanent injunction preventing the defendants from denying plaintiffs access to school district facilities because they intend to use those facilities to hold religious worship services. The defendants cross-move for summary judgment, asserting that § 414 is constitutional on its face and as applied to the plaintiffs. Defendants also argue that allowing the plaintiffs to use public school facilities for religious worship services would violate the Establishment Clause of the First Amendment.

For the reasons set forth below plaintiffs' motion is denied and defendants' motion is granted.

I.

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1. Plaintiffs' motion to substitute Jorge Vega, the new pastor of Full Gospel Tabernacle, for Robert Castro as a party to this action is granted. The Clerk of the Court is directed to amend the case caption accordingly.

Under Fed.R.Civ.P. 56(c), the moving party is entitled to summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering such a motion, "a district judge must view the evidence in the light most favorable to the non-moving party and must draw all inferences in favor of that party." *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 382 (2d Cir.1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Accordingly, summary judgment is warranted where, "after adequate time for discovery . . . [the nonmoving party] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

II.

The following facts are undisputed.

Full Gospel Tabernacle ("Full Gospel") is a Christian church currently meeting in a building owned by the church in Far Rockaway, New York. In late April 1994, Full Gospel determined that an alternative venue was needed for Sunday worship services to accommodate the church's growing membership. Accordingly, on May 6, 1994, Reverend Robert Castro, the pastor of Full Gospel Tabernacle, filed an application with Public School 105 Queens ("P.S.105"), a school located within Community School District 27 ("CSD 27"), to rent the school's auditorium, classrooms, and cafeteria

for each Sunday in June. Kenneth Grover, Deputy Superintendent of CSD 27, denied the application on May 16, 1994, citing Board of Education Standard Operating Procedure 5.9 (hereinafter referred to as "SOP 5.9"), which provides in part that "[n]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school."[2]

Reverend Castro applied again in late May 1994 to use the facilities of P.S. 105 every Sunday in July. Again his application was denied. Full Gospel then retained legal counsel, and filed the instant action on November 2, 1994.

Through discovery, plaintiffs learned that several other churches in the area had been allowed to conduct religious activities in school district buildings after school hours pursuant to permits issued by CSD 27.[3]

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2. The full text of SOP 5.9 is as follows:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains religious viewpoint or for distributing such material is permissible.

This regulation purports to implement N.Y. Educ. § 414, *see infra.*

3. The following organizations were also granted permits to use school facilities after school hours: American Legion for a County Convention Awards Assembly; Dance Dimension for dance recital rehearsals; the Department of Sanitation for basketball; Belle Harbor Property Owners Association for a Board of Directors Meeting; Rockaway Action for Mural Painting; Mercaz Hatorah for

In October 1993, CSD 27 granted Rita Speller, pastor of the Deliverance Temple Church, a permit to hold a Halloween party at P.S. 155. Following the Halloween party, Reverend Speller applied for, and received, permits to use the school facilities on Sundays and some weekday evenings almost every week from November 1993 through November 1994. Although Reverend Speller's initial application listed the activity as a Halloween party, no description of the activities to be conducted was included on subsequent permit application forms, and according to Reverend Speller's testimony, no one from the school district ever inquired about her intended use of the facilities. Speller Dep. at 18. Each permit was approved by Sheila McElhatten, secretary to the Director of Operations for CSD 27.

Reverend Speller testified that she used the school facilities to conduct the worship services of the Deliverance Temple Church. Speller Dep. at 26-27. On Sundays she would preach, teach the Bible to her congregation and engage in prayer. Speller Dep. at 7-8. On weekday evenings the facilities were used for a variety of activities, including a religious play, inspirational music and dance, and Bible discussion groups. Speller Dep. at 9-12. In November 1994, Reverend Speller was told she could no longer use the school's facilities because it had come to the attention of school officials that she was

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a basketball program; Congressman Schumer for a Town Hall meeting; Queens Kiwanis Club Girls Softball Team; Tappin-Feet for a dance recital; Local 372 for a union meeting; LWG Co-op Inc. for a shareholder's meeting; ARYA SAMAJ USA for a cultural evening; Eye of Tiger Karate for a karate tournament. CSD 27 has also granted permits to the Church of St. Paul, the New Hope Baptist Church, the Salvation Tabernacle and the Way of Life Gospel Center for gospel recitals. A permit was also issued to Rabbi Shlomo Volner for a Purim party. Pl. Rule 3(g) Stmt., ¶ 10.

conducting religious services on the premises. Speller Dep. at 23.

In June and July 1994, CSD 27 granted Lisa and Rubin Mitchell, pastors of the Jesus Family Fellowship, permits to use the auditorium of Junior High School 198 every Tuesday and Sunday in July and August 1994. Reverend Lisa Mitchell described the five services they held at JHS 198 as follows:

> We would come in and have what's called a group prayer, congregational prayer. Then we would go into praise and worship, sing different praise and worship songs accompanied by music. From there, Reverend Mitchell, he would get up and deliver the message, the service for that evening.

Mitchell Dep. at 12. Following Reverend Mr. Mitchell's sermon, the Reverends would engage in an "altar call," where they would "invite someone to receive the Lord as their Savior." Mitchell Dep. at 12. The service would then conclude with a closing prayer. Mitchell Dep. at 12. On Sundays, the Mitchells would also conduct religious instruction for children. Mitchell Dep. at 15.

The Mitchells testified that they informed McElhatten at the time they applied for the permit that they intended to use the school facilities for church services. Mitchell Dep. at 41. According to their testimony, McElhatten granted them a permit anyway, after concluding that the Mitchells' intended purpose fell within the second sentence of SOP 5.9, which allows use of school facilities for the "purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material . . . ." Mitchell Dep. at 68. However, on July 21, 1994, Kenneth Grover, deputy superintendent of CSD 27, informed the Mitchells that their

permit was rescinded effective immediately, citing SOP 5.9. When the Mitchells demanded an explanation, they were told that McElhatten had issued the permit in error. Mitchell Dep. 55-62.

The district does not deny that these incidents occurred. However, it contends that these permits were erroneously approved due to flaws in the permit application process which have been remedied since a new Director of Operations was hired in September 1994.

Typically, an application to use school facilities after school hours is first reviewed by the custodian and the principal for the school which the organization seeks to use. Brawer Decl., ¶ 8-10. The application is then forwarded to the district office for review and possible approval. Brawer Decl., ¶ 10. Through the fall of 1994, this review at the district level was performed by McElhatten as secretary to the Director of Operations for CSD 27. Brawer Decl., ¶ 11.

However, for most of 1994, the position of Director of Operations for CSD 27 was vacant. Brawer Decl., ¶ 7. When a new Director of Operations was hired for CSD 27 in September 1994, he discovered that McElhatten had granted several permits without any description of the activity and, in some cases, like those described above, for uses not permitted by Board of Education regulations. Brawer Decl., ¶ 12. To remedy this problem on a temporary basis, Grover instructed McElhatten in the Fall of 1994 to forward any unusual applications to his office for review. Brawer Decl., ¶ 13.

Since December 1994, the Director of Operations for CSD 27 reviews all permit applications personally, to ensure that all activities are fully described on the application and that no application is granted for an activity prohibited by Board of

Education regulations. Brawer Decl., ¶ 20. In addition, a memorandum was sent to all principals and custodians in the district reminding them that SOP 5.9 prohibits the use of school facilities for religious worship services. Brawer Decl., ¶ 23. Since enacting these procedures, the district has been successful in ensuring that school facilities are not used for religious worship services or instruction, and permits have been denied when such use was requested. Brawer Decl., ¶ 26.

Regardless, plaintiffs argue that the district's refusal to give Full Gospel access to school district facilities for religious worship services, in light of the other religious and secular activities which have taken place in school district buildings, violates the Free Speech Clause and the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. In response, defendants argue that the district's policy and § 414 are constitutional on their face, and as applied to the plaintiffs, and that granting plaintiffs the relief they request would violate the Establishment Clause of the First Amendment.

III.

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985). In recognition of this principle, the Supreme Court has articulated a forum analysis, identifying three categories of public property for free speech purposes. An individual's right to speak on public property is thus "largely dependent on the nature of the forum in which the speech is delivered." *Bronx Household of Faith v. Community*

School District No. 10, 127 F.3d 207, 211 (2d Cir.1997).

First, there are traditional public forums, such as streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). The second category, referred to in the caselaw as designated public forums, "consists of public property which the State has opened for use by the public as a place for expressive activity." *Id.* Content-based exclusions from both traditional and designated public forums must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* at 45-46, 103 S.Ct. at 954-56. The third category, non-public forums, includes public property which is not by tradition or designation a forum for public communication. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955-56.

In addition, the Second Circuit has recognized a sub-set of designated public forums termed limited public forums. *See, e.g., Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679 (2d Cir.1988). This sub-category includes property designated by the government for use by certain groups or for the discussion of certain subjects. *Perry*, 460 U.S. at 46 n. 7, 103 S.Ct. at 955 n. 7; *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3448-49. As to those particular groups and subjects, the forum is an open one, and any regulation based on content must be narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955-56. However, "[u]nder the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses, and exclusion of uses -- even if based upon subject matter or the speaker's identity -- need only be reasonable and viewpoint-

neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80 (citations omitted). "Where the proposed use falls outside of the limited forum, the State is subject to only minimal constitutional scrutiny." *Bronx Household of Faith*, 127 F.3d at 211 (citations and internal quotations omitted).

Both parties agree that a public elementary school is not a traditional public forum. *See Deeper Life*, 852 F.2d at 679 ("[P]ublic elementary schools are not, as to the general community, traditional public fora."). However, plaintiffs argue that CSD 27 school facilities have become designated public forums, either by virtue of § 414 or by the school district's practice of allowing a wide variety of secular and religious groups to use the facilities on a regular basis. Defendants dispute this characterization of the school facilities and argue that the facilities are only limited public forums, from which certain subjects, including religious worship services, have been constitutionally excluded. Since the level of scrutiny applied to plaintiffs' claims depends on the type of forum at issue, I must first resolve this threshold dispute.

Plaintiffs argue that § 414 of the New York Education Law designates public school facilities as open public forums. In support of this argument, plaintiffs quote portions of the statute, which states that school facilities may be used for "the purpose of instruction in any branch of education, learning or the arts" and for "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community . . . ." N.Y. Educ. Law § 414(1)(a), (c). According to plaintiffs, this broad language reflects the legislature's intent to designate public schools as open public fora.

However, the statute also specifically lists eight categories of permissive use. N.Y. Educ. Law § 414(1)(a)-(j). If the language quoted by the plaintiffs, standing alone, created an

open public forum, the remainder of the statute would be rendered meaningless. It is well-settled that reading a statute in this manner is disfavored. *Allen Oil Co. v. Commissioner of Internal Revenue*, 614 F.2d 336, 339 (2d Cir.1980) ("Normally, a statute must if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless.").

Moreover, a number of activities are specifically excluded from the list of permissible purposes.[4] For example, school

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4. A more complete excerpt of § 414 follows:

The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are

facilities may not be used for meetings or entertainment which are exclusive or not open to the general public, or which are being held for a commercial purpose. N.Y. Educ. Law § 414(1)(c)-(d). In addition, meetings sponsored by political organizations are not permitted unless specifically authorized by the district or the board of education. N.Y. Educ. Law § 414(1)(e). While a public school can be used for graduation exercises held by not-for-profit schools, that use is conditioned upon no religious service being performed. § 414(1)(j); *see* n. 4 *supra*.

Thus, reading the statute as a whole, I conclude that § 414 does not designate public school facilities as open public forums, but rather creates a limited public forum. This conclusion is reinforced by school district policy, expressed in SOP 5.9, which specifically excludes religious worship services as a permissible use. *See Bronx Household of Faith*, 127 F.3d at 212-13 (holding that the limitation imposed by SOP 5.9 "is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects.").

In the alternative, plaintiffs argue that defendants have

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under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .

The statute goes on to authorize use of public schools as polling places, and for civic forums and community centers, places of instruction for the mentally retarded, athletics, child care services during non-school hours, and "graduation exercises held by not-for-profit schools, *provided that no religious service is performed*." § 414(1)(e)-(j) (emphasis added).

created an open forum by practice by allowing a wide variety of secular and religious groups to use the school district's facilities on a regular basis. I find this argument unpersuasive, given the uncontested facts presented on this motion.

In *Perry*, 460 U.S. at 39, 103 S.Ct. at 951-52, the plaintiffs, a rival teachers' union, challenged the elected union's exclusive right of access to school mail facilities. In support of their access claim, plaintiffs argued that the school mail facilities had become an open forum because of the "periodic use of the system by private non-school-connected groups . . . ." *Id.* at 47, 103 S.Ct. at 955. The Supreme Court rejected this argument:

> If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then [plaintiffs] could justifiably argue a public forum has been created. This, however, is not the case. [T]here is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations . . . to use the facilities. This type of selective access does not transform government property into a public forum.

Id. at 47, 103 S.Ct. at 956.

A similar analysis is appropriate here. It is undisputed that § 414, and the Board of Education procedures implementing the statute, establish some criteria upon which permission to use school facilities is either granted or denied. The school

facilities are not open to indiscriminate use by the general public and applications for permits are reviewed by the school principal and custodian, and then again at the district level. Although it is clear that some applications were granted in contravention of Board policy, such departures from declared policy are hardly sufficient to create a contrary policy. Plaintiffs have presented no evidence that permission to use school facilities is granted as a matter of course to all who file an application. *See Cornelius*, 473 U.S. at 804, 105 S.Ct. at 3450 ("Although the record does not show how many organizations have been denied permission . . . ., there is no evidence suggesting that the granting of the requisite permission is merely ministerial.").

At most the proof shows that access has been granted to some groups. However, as the Supreme Court stated in *Perry*, "[t]his type of selective access does not transform government property into a public forum." 460 U.S. at 47, 103 S.Ct. at 956; *see also Cornelius*, 473 U.S. at 805, 105 S.Ct. at 3450-51; *cf. Widmar*, 454 U.S. at 265-68, 102 S.Ct. at 272-74 (holding that university created open forum through its policy of providing university facilities for the meetings of all registered student groups without qualification). The public elementary schools located within CSD 27 are simply not places that have been "devoted to general, unrestricted public assembly by long tradition or by policy or practice." *Bronx Household of Faith*, 127 F.3d at 212-13.

Thus, I conclude that the school facilities at issue in this case are limited public forums by virtue of § 414 and school district policy.[5] *See Bronx Household of Faith*, 127 F.3d at 212-13. As

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5. Accordingly, I reject plaintiffs' claim that § 414 and SOP 5.9 are facially unconstitutional since they "exclude religious speech

such, a speaker may be excluded from using school facilities after school hours "if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose special benefit the forum was created . . . ." *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451 (internal citations omitted). Defendants assert that plaintiffs were denied access on the basis of a permissible subject matter distinction, since § 414 does not include religious worship services as a permissible use and SOP 5.9 explicitly prohibits use of the facilities for religious worship services.

However, once access is permitted based on subject matter or speaker identity, the constitutional right of access extends to other entities or speech of a similar character. *Perry*, 460 U.S. at 48, 103 S.Ct. at 956-57; *see also Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir.1991) ("[O]nce [the government] allows expressive activities of a certain genre [in a limited public forum], it may not selectively deny access for other activities of that genre."). Plaintiff argues that, even if the school district's facilities are considered limited public forums, they have been opened to religious worship services, despite SOP 5.9, as evidenced by the permits granted to Rita Speller of the Deliverance Temple, and Lisa and Rubin Mitchell of the Jesus Family Fellowship. As such, plaintiffs contend that the defendants' refusal to grant Full Gospel a permit to conduct similar religious worship services on school property after school hours amounts to unconstitutional viewpoint discrimination.

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from an *otherwise open forum* based upon its religious content." Pl. Mem. in Support of Mot. for Sum. Judgmt. at 19 (emphasis added). As discussed in text, CSD 27 public school facilities are not open public forums.

The past practice of the school district in granting access to its facilities is a relevant factor in determining whether the school district has opened its limited forum to religious worship services. *See Deeper Life I*, 852 F.2d at 680; *see also Travis*, 927 F.2d at 693. In *Travis*, the school district granted a permit to an organization called "On the Level Music!" to hold a Christmas concert in the middle school auditorium called "A Concert For the King -- Christmas in Owego." 927 F.2d at 693. The program consisted of twelve Christian hymns and a Bible reading by the mayor of Owego. *Id.* Several years later, Birthright of Owego, a pro-life pregnancy counseling organization, requested permission to use the middle school auditorium for a magic show by a Christian illusionist. *Id.* at 690. The program was to consist of an ordinary magic show, followed by a short message promoting the Christian gospel. *Id.* at 693. Despite the similarities between the two programs, the school district denied Birthright a permit on the basis that the proposed magic show would involve religious activity. *Id.* at 691.

Birthright and the Christian illusionist, Toby Travis, sued the school district, alleging that the district's refusal to grant them a permit violated their free speech rights. The district court granted plaintiffs summary judgment on their free speech claim. On appeal, the Second Circuit held that the Christmas program had created "at least a limited public forum for fund-raisers with religious themes." *Id.* As such, "permitting a fund-raiser with a religious theme while excluding one with a different religious theme is not viewpoint-neutral as a matter of law . . . ." *Id.* at 694. Since the school district failed to provide a constitutionally sufficient explanation for the different treatment, the Court of Appeals affirmed the District Court's grant of summary judgment to plaintiffs. *See also Trinity United Methodist Parish v. Board of Education*, 907 F.Supp. 707 (S.D.N.Y.1995) (holding that school district could not deny

permit to church seeking to hold magic show by christian illusionist when it subsequently granted permit to another church for gospel concert).

Plaintiffs argue that similar facts are present here. It is undisputed that the defendants granted permits to the Deliverance Temple Church and the Jesus Family Fellowship and that both organizations held religious worship services and instruction on school property after school hours on a regular basis. Accordingly, relying on *Travis*, plaintiffs argue that the defendants are constitutionally obligated to grant them permission to conduct religious worship services on school property after school hours, since such activity has been permitted in the past.

The instant case is distinguishable from *Travis*. In *Travis*, the defendants asserted that they had genuinely misunderstood the religious nature of the Christmas concert. 927 F.2d at 693. The Court rejected this defense, and charged the defendants with the knowledge that the program was an openly religious affair. *Id.* However, it was critical to the court's analysis that

> [t]here is no evidence in the record that the School District, having learned that it had mistakenly permitted a religious program in violation of its policy, took steps to prevent a similar mistake in the future, and that such corrective measures caused the denial of [plaintiff's] application.

Id. Moreover, counsel for the school district in *Travis* could not even guarantee that the school district would deny permission for another Christmas program in the future. *Id.*

Unlike the school district in *Travis*, the Board of Education in the case at bar promulgated a clear policy, binding upon the defendant school district, that prohibits the use of school

facilities for religious worship services.[6] It is undisputed that McElhatten, a secretary in the school district office, failed to properly implement this policy by granting a permit to the Deliverance Temple Church without any description of the activity to be conducted and one to the Jesus Family Fellowship, after erroneously interpreting SOP 5.9.[7] In addition, it appears from the record that defendants were not aware that McElhatten had granted permits for religious worship services in violation of SOP 5.9 until plaintiffs brought

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6. In *Travis*, the court of appeals noted that the school district's policy was to treat applicants whose programs have religious themes on an ad hoc basis. 927 F.2d at 694. As a result, the court of appeals modified the district court's injunction to prohibit denial of access to the *Travis* plaintiffs, "unless the School District expressly adopts a new policy that treats all programs with a religious theme equally." *Id.* Such a policy is present in the case at bar in the form of SOP 5.9. The permit denial in this case was not due to an ad hoc decision in the absence of a clear policy, but rather McElhatten's failure to properly implement the district's policy.

7. Plaintiffs also point to permits granted to the Salvation Tabernacle Church and several other churches for gospel concerts as evidence that the school district has opened its facilities to religious worship services and instruction. However, the Second Circuit has held that a concert that consists of gospel and spiritual music is a musical program, not a religious event which opens the forum for other religious activity. *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 387 (2d Cir.1992), *rev'd on other grounds*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). One could also characterize a gospel concert as music from a religious perspective. *See* SOP 5.9. Although the "sacred concert" held by the Salvation Tabernacle Church included an opening prayer and closing salvation message, these were very brief and did not constitute the bulk of the program.

the matter to the school district's attention.[8] It is undisputed that once school district officials became aware of these violations of district policy, the erroneously issued permits were immediately revoked.

Moreover, review of permit applications was transferred from McElhatten to Kenneth Grover, deputy superintendent of CSD 27, and later permanently transferred to the Director of Operations for CSD 27. In addition, all principals and custodians were reminded by memorandum that SOP 5.9 prohibits use of school premises for religious worship services and that it is their responsibility to ensure adherence to the policy. These school officials were also charged with the responsibility to inquire further about an organization's proposed purpose if that purpose is unclear, by requesting a flyer or other documentation from the organization.[9] If the school principal or custodian becomes aware that the policy has been violated despite these precautions, they are to report any violations to the district office and send a warning letter to the organization.

Significantly, since these corrective measures were taken, no permits have been issued for religious worship services or

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8. It is important to note that plaintiffs' application for a permit was denied by Kenneth Grover, deputy superintendent of CSD 27, not McElhatten.

9. Plaintiffs suggest that this type of further inquiry into the religious nature of an organization's proposed purpose would cause an entanglement between church and state. However, in *Bronx Household of Faith*, 127 F.3d at 215, the court of appeals held that the distinction between religious services and the discussion of permissible topics from a religious viewpoint was not a difficult distinction for school authorities to make.

instruction, and requests to use school facilities for such activity has been denied. Accordingly, unlike the defendants in *Travis*, defendants in this case "took steps to prevent a similar mistake in the future" once they learned that the policy had been violated. Moreover, in contrast to the corrective measures evaluated unfavorably by Judge Parker in *Trinity*, *see* 907 F.Supp. at 716, defendants' steps in this case appear to be effective.

In sum, the defendants have not opened a limited public forum for religious worship services by virtue of the fact that permits were granted on two prior occasions for such use, in light of the facts that these permits were granted by an individual who failed to properly implement the district's clear policy against such use, and the district promptly corrected these errors and took effective steps to prevent such a mistake in the future.[10] Since the Second Circuit has already held that SOP 5.9 is a reasonable regulation, *see Bronx Household of Faith*, 127 F.3d at 214-15, plaintiffs' exclusion from school

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10. I recognize that in *Bronx Household of Faith*, the court of appeals observed several times that the school district in that case had never previously rented a school for the religious purposes intended by the plaintiff in that case. *See, e.g.*, 127 F.3d at 212-13 ("What is not permitted under SOP 5.9 is the use of school premises for worship or instruction, and it is important to note that the parties have agreed that District # 10 never has rented a school property for that purpose.") But I do not read that language as holding or suggesting that a minor school bureaucrat's uninformed and inadvertent permission for such use by other churches, in derogation of district policy, confers upon the plaintiff church at bar a permanent license to hold religious services in public schools. This is the logical conclusion of plaintiffs' argument, but the school district's contrary policy, clearly declared, cannot so lightly be cast aside.

facilities was therefore constitutional, as long as the exclusion of religious worship services is viewpoint neutral.

IV.

Plaintiffs argue that the exclusion of religious services is unconstitutional viewpoint discrimination, regardless of forum designation. Plaintiffs point out that § 414 allows "instruction in any branch of education, learning or the arts," "social, civic and recreational meetings . . . and other uses pertaining to the welfare of the community." Plaintiffs contend that religious worship services and instruction is speech within these categories from a religious, rather than secular, perspective. As such, according to plaintiffs, the exclusion of religious worship services and instruction constitutes unconstitutional viewpoint discrimination.

In support of their argument, plaintiffs rely on *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). In that case, the defendant school district, on the basis of § 414, denied the plaintiff a permit to use school facilities after school hours to show a six-part film on parenting from a Christian perspective. *Id.* at 388-89, 113 S.Ct. at 2144-45. The district court and the court of appeals both rejected the plaintiff's claims, holding that the school property was a limited public forum from which activities with a religious purpose had been constitutionally excluded. *Id.* at 389-90, 113 S.Ct. at 2144-45. The Supreme Court reversed, holding that it was unconstitutional viewpoint discrimination to allow school property to be used for the expression of views on family issues and child-rearing, without also allowing the property to be used for the expression of a religious viewpoint on the same subjects. *Id.* at 394, 113 S.Ct. at 2147 ("The film series involved here no doubt dealt with a subject otherwise

permissible . . ., and it exhibition was denied solely because the series dealt with the subject from a religious standpoint."). Plaintiffs argue that this holding applies equally to the case at bar.

The distinction between content and viewpoint is "not a precise one." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831, 115 S.Ct. 2510, 2517, 132 L.Ed.2d 700 (1995) (university's denial of printing cost funding to student newspaper with Christian editorial viewpoint condemned as viewpoint discrimination). In the case at bar, although SOP 5.9 prohibits the use of school facilities for *religious worship services*, it allows "the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or *material which contains religious viewpoint* or for distributing such material." (emphasis added). In *Bronx Household of Faith*, 127 F.3d at 214-16, the Second Circuit held that this distinction is tenable and "not difficult for school authorities to make," *id.* at 215, and that the exclusion of religious worship services does not amount to unconstitutional viewpoint discrimination. I am bound by this very recent appellate decision.[11]

Since the exclusion of religious worship services is reasonable in light of the purposes served by the forum and viewpoint neutral, *see Bronx Household of Faith*, 127 F.3d at 215, plaintiffs' free speech rights were not violated by the defendants' denial of their permit application.

V.

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11. The Second Circuit decided *Bronx Household of Faith* on September 15, 1997.

Plaintiffs also assert claims under the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. Identical claims were rejected by the Second Circuit in *Bronx Household of Faith*, 127 F.3d at 215-17. Plaintiffs also assert a claim under the Religious Freedom Restoration Act of 1993. However, that claim must be dismissed with prejudice in light of the Supreme Court's determination in *City of Boerne v. Flores*, --- U.S. ----, ----, 117 S.Ct. 2157, 2172, 138 L.Ed.2d 624 (1997), that the Religious Freedom Restoration Act is unconstitutional. *See Bronx Household of Faith*, 127 F.3d at 217.

VI.

For the foregoing reasons, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted. Plaintiffs' earlier motion for a preliminary injunction is also denied for the reasons state above.[12] The Clerk of the Court is directed to dismiss the complaint with prejudice.

It is SO ORDERED.

/s/ Charles S. Haight, Jr.
Charles S. Haight, Jr.
U.S.S.D.J.

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12. Plaintiffs' recent Motion for Ruling is granted. In addition, although plaintiffs' attorneys, Mark N. Troobnick, Esq. and Jay Alan Sekulow, Esq., assert that their motions to appear pro hac vice are also pending, those motions were granted on December 6, 1994.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FULL GOSPEL TABERNACLE	)	97-9235
	)	
vs.	)	
	)	
COMMUNITY SCHOOL DISTRICT 27	)	
	)	

[Sept. 1, 1998]

ORDER

Before: HON. RALPH K. WINTER, C.J.

IT IS HEREBY ORDERED that the motion for hearing in banc has been transmitted to the judges for the Court in active service and no such judge has requested that a vote be taken thereon.

FOR THE COURT,

CAROLYN CLARK CAMPBELL, Clerk
by:

/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX D

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

APPENDIX E

N.Y. Educ. Law § 414

(McKinney 1988 & Supp. 1999)

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the

petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social

services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

APPENDIX F

SOPM 5.1 to 5.12.4 (date 10/93)

Standard Operating Procedures
Schools
Division of Business and Administration

Chapter: EXTENDED USE OF SCHOOL BUILDINGS

Topic 5. REGULATIONS GOVERNING THE EXTENDED USE OF SCHOOL FACILITIES

Applicants are responsible for adhering to all applicable provisions of this chapter, including the regulations set forth below.

5.1 Permit holders shall exercise the utmost care in the use of school premises and property; make good any damage arising from the occupancy of any part of school premises; and save harmless the Board of Education from any claim, loss, or damage by reason of any act on the part of the permit holder, its members, officers, employees and agents, or any person using or coming upon the premises by invitation or with the permission of the permit holder.

5.2 The use of school facilities must be in accordance with federal law, New York State law, local law and Board of Education policies.

5.3 The primary use of school premises must be for Board of Education programs and activities.

5.4 Every group or organization must have an approved

permit to use a school's premises.

5.5 After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities.

5.6 In addition to the use described in items 2.11, 5.3 and 5.5, school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive athletic

contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

5.7 Organizations requesting space where fund-raising or solicitation or acceptance of donations will take place, must observe the specific rules outlined in 2.11.

5.8 School premises may not be used for commercial purposes, except for flea market operations authorized pursuant to Regulation of the Chancellor, A-650.

5.9 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

5.10 Classrooms and offices must be left in the same condition in which they were found. Desks, displays, papers, etc., shall not be disturbed.

5.11 Masking tape, plastic tape and similar substances shall not be used to affix materials to painted surfaces or chalkboards.

5.12 Where services by Board of Education employees are required by these regulations, the applicant organization is responsible for all charges incurred.

5.12.1 When shop rooms, home economics rooms, or similar rooms with special equipment are required, a licensed Board of Education teacher must be assigned.

5.12.2 Where kitchen equipment is to be used in the preparation of food, an Office of School Food and Nutrition Services employee must be assigned.

5.12.3 For the use of audio-visual equipment, public address systems, stage lighting, pianos and similar items, prior approval of the principal must be obtained in writing, with a copy attached to the Permit Application. Only Board of Education assigned persons may operate school equipment.

5.12.4 For the use of swimming pools, one Board of Education licensed swimming teacher or a licensed Board of Education teacher with current American Red Cross Water Safety Instructor's certification must be assigned for every 25 pool participants. All persons participating in pool activities must have their head and shoulders above the water at the shallow end of the pool. The appropriate Department of Health regulations regarding the use and operation of swimming pools must be observed.

Supreme Court, U.S.
FILED
MAY 26 1999
CLERK

No. 98-1714

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

FULL GOSPEL TABERNACLE and JORGE VEGA,
Pastor of Full Gospel Tabernacle,

Petitioners,

- v. -

COMMUNITY SCHOOL DISTRICT NO. 27, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether a public school district which has opened its school buildings to certain after-hour uses enumerated in State law is constitutionally required to rent its facilities to a church for regularly scheduled religious worship services?

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STATEMENT OF THE CASE

Petitioners Full Gospel Tabernacle, a Christian Church, and its pastor, Robert Castro (collectively, "the Church") commenced this action seeking declaratory and injunctive relief against respondents Community School District No. 27 (the "District"), the Board of Education of the City of New York (the "Board"), and various employees, officers and members of the board of the District. The Church alleges that the District denied it the use of Public School 105 ("P.S. 105") for religious worship services and that this denial was made pursuant to the Board's Standard Operating Procedures and section 414 of the New York State Education Law, upon which those procedures are based. The Church argues that section 414 and the Board's operating procedures, insofar as they prohibit the Church from conducting weekly church worship services on public school property, violate the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.

As framed by petitioners, the issue presented here is identical to that raised in Bronx Household of Faith v. Board of Education, 127 F.3d 207 (2d Cir. 1997), cert. denied, 118 S.Ct. 1517 (1998). For the same reasons that this Court denied certiorari in that case, the Court should deny certiorari here as well. Simply put, a State should have the power to prohibit its school districts from renting its elementary school buildings to outside organizations for the purpose of conducting religious worship services.

The Parties

The District has a student population of over 33,000 students attending pre-kindergarten through eighth grade in its

35 public schools (JA412, ¶¶ 12, 14).[1] P.S. 105 is located in the District and has students attending kindergarten through sixth grade, ranging from three to eleven years of age (JA412, ¶¶ 14, 15). Both the District and its officers are obligated to follow the Board's operating procedures.

Petitioner Full Gospel Tabernacle is a Christian Church located in Far Rockaway, Queens (JA11, ¶ 9). Members of the Church have children attending schools within the confines of the District, including P.S. 105 (JA413, ¶ 22). There are also members of the Church who are teachers in the school (JA413, ¶ 23).

The Dispute

The Church alleges that on April 25, 1994, it requested permission to rent P.S. 105 for worship services for four Sundays in June 1994 (JA15-16, ¶¶ 34, 40). These services were to include prayer, music, religious instruction, Christian testimony and fundraising (JA17, ¶ 43). On May 2, 1994, the Church was informed by Sheila McElhatten, a secretary in the District office, that their permit request was denied because of the Board's policy prohibiting the use of school facilities for religious worship services (JA15, ¶35). When Pastor Castro told Ms. McElhatten that recent Supreme Court rulings required the District to grant the Church's permit, Ms. McElhatten agreed to send the Church a permit application (JA15-16, ¶ 36-39). The Church's written request for a permit was thereafter denied by letter from Deputy Superintendent

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[1] Numbers in parentheses preceded by a "JA" refer to pages in the Joint Appendix submitted to the Court of Appeals. Numbers in parentheses preceded by "App." refer to the Appendix to the Petition for Writ of Certiorari.

Kenneth Grover, who explained that the requested use was not permitted by the Board regulations (JA40).

On May 27, 1994, the Church again requested permission to rent P.S. 105 for worship services on Sundays during the month of July 1994 (JA17, ¶ 44). The District again denied the Church's application (JA17, ¶ 45).

Statutory and Regulatory Framework

New York Education Law section 414 governs the use of public school facilities by non-school groups during non-school hours. The statute, the relevant provisions of which have been in effect since 1910, sets forth a list of uses which a local school district may permit in their facilities during such hours. While not expressly excluded by the statute, religious worship and instruction have been held by New York State courts and by the Court of Appeals for the Second Circuit not to be among the enumerated permissible uses.

The Board has promulgated standards which govern the use of City public school facilities in compliance with section 414. The Standard Operating Procedures Manual ("SOPM") published by the Board includes a chapter entitled "Extended Use of School Buildings" (JA350-51). Topic 5 of that chapter sets forth "Regulations Governing the Extended Use of School Facilities" which in large part tracks the language of section 414 in listing permissible uses of the school facilities. Id. The SOPM also contains a catch-all provision in section 5.6.6, which provides that school premises may be used "for such other purposes as may be authorized by law" (JA350). Since section 414 establishes those "purposes [which are] authorized by law," this catch-all provision renders the District's operating procedures coextensive with section 414.

Consistent with the interpretation of section 414 given by the courts, SOPM section 5.9 states that religious worship services are not an authorized use of school facilities (JA351). In an effort to implement this Court's decision in Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993), section 5.9 does permit "the use of school premises by outside organizations . . . for the purpose of discussing religious material or material which contains a religious viewpoint." Id.

Prior District Procedures for After-School Use of Buildings

Prior to September 1994, permit applications for the after-school use of District buildings were first reviewed by the individual school's custodian and principal (JA342, ¶9). Applications were then forwarded to central district office, where the application was reviewed by a secretary, Sheila McElhatten (JA342, ¶11). During this period, some permits were granted even though they failed to describe the activity to be engaged in by the applying organization (JA342, ¶12).

Evidence was presented that three groups had used District facilities for religious purposes prior to November 1994. In November 1992, the Salvation Tabernacle Church had requested permission to hold a "sacred concert" in a public school in the District (JA138). The concert included short opening and closing prayers and two and three-quarter hours of gospel music (JA147). This permit was granted.

A second church, the Jesus Family Fellowship, made two separate applications to use school facilities in the District for religious worship services in July and August 1994 (JA229). After discussions with the applicants and a review of the advertising flyers for the event, the school custodian and

the District secretary, Ms. McElhatten, granted the permit for July, mistakenly relying upon the second sentence in SOPM 5.9 which permits the use of school facilities "for the purpose of discussing religious material" (JA282-89). On July 21, 1994, after District Deputy Supervisor Kenneth Grover became aware of the inappropriate use of the facilities, the permit for the remainder of July was rescinded, and the permit application for August was returned (JA298, JA314). Before their permit was rescinded, the Jesus Family Fellowship conducted five religious worship services on District property (JA231, JA265).

District facilities were also used by a third group, the Deliverance Temple Church, for two Halloween parties in October 1993 and October 1994, and a series of bible study meetings from November 1993 to November 1994 (JA166-68, 171). Apart from the permit application for the first Halloween party (JA206), the church left blank the space marked "Description of Activities to be Conducted" in every permit application (JA199-220). The church's pastor, Rita Speller, does not remember anyone ever asking her what the church was going to use the facilities for after the first Halloween party (JA179). The church stopped using District facilities in November 1994, when the District became aware that the church was conducting worship services on school property in violation of State law (JA183).

Revised District Procedures for After-School Use of Buildings

In March 1994, shortly before the Church submitted its application, a new District Supervisor, Brenda Isaacs, and a new Deputy District Supervisor, Kenneth Grover, were appointed to administer the District (JA343, ¶17). Early in his tenure, Grover discovered flaws in the process for granting

permits to outside organizations (JA414). For example, he discovered that permits had been granted which contained no description of the events to be conducted. Id. As a temporary measure, Mr. Grover directed Ms. McElhatten to forward any unusual permit application to him for approval. Id.

In September 1994, Sandy Brawer was hired as the District's Director of Operations, the third ranking position in the District, which position had been vacant since the new Superintendent had been hired (JA341, ¶ 7). As part of his duties, Brawer was placed in charge of reviewing and improving the after-hours permit application process (JA341-42, ¶7). Brawer discovered that many principals in the District were unfamiliar with the requirements of State law and the SOPM regarding after-hours activities, and that there was no single high-ranking person in the district with a thorough knowledge of the requirements of the SOPM (JA344, ¶18).

Beginning in December 1994, and continuing to the present, Brawer has personally reviewed each permit application for after-hours use of school buildings in the District (JA344, ¶20). No permit application will be approved if it is incomplete or if it is for a purpose not permitted by the SOPM (JA345, ¶¶21-22). If an application is incomplete, the application is returned to the school (JA345, ¶21). If the application is for an impermissible use, the application is denied with a letter informing the school and the applicant of the reasons for the rejection (JA345, ¶22). These letters help keep the District's principals informed about the requirements of the SOPM (JA345, ¶22).

In addition, in March 1995, Brawer sent a memorandum to all the principals and custodians in the District reminding them of the provision in the SOPM prohibiting the

use of school facilities for religious worship services (JA353). The memorandum stated that a principal should inform Brawer if he or she learns that any organization was improperly using their facilities for religious worship services. Id. A copy of SOPM 5.9, which sets forth the relevant prohibition, was attached to the memorandum (JA353-54).

The procedures implemented by the District were designed to ensure that no permit will be granted for a use that is not permitted by the SOPM, including, but not limited to, church worship services (JA346, ¶25). Since the procedures were implemented in 1995, there have been no church worship services held in the facilities of the District (JA346, ¶26).

This Action

The Church commenced this action in October 1994, asserting that the District's denial of its permit applications violated the Church members' rights under the Free Speech, Free Exercise, Free Assembly and Establishment Clauses of the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Religious Freedom Restoration Act. In April 1996, the Church moved for summary judgment. The District cross-moved for summary judgment, arguing that Education 414 and the Board's operating procedure were constitutional under this Court's recent decision in Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2d Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998).

District Court Decision

In its well-reasoned decision (App. 3a-25a), the District Court rejected the Church's constitutional and statutory claims.

In reliance upon the Second Circuit's decision in Bronx Household, the District Court held that under Education Law section 414 and the Board's operating procedures, P.S. 105 was a "limited public forum" closed to all unspecified uses and excluded uses (App. 16a). In accordance with Bronx Household, the District Court held that the exclusion of worship services from this limited forum was reasonable (App. 22a).

With respect to the Church's argument that the District had opened its facilities to religious worship services by other groups, the District Court found that the District had not inadvertently created an open forum (App. 18a-22a). The Court stressed that the prior permits were "granted by an individual who failed to properly implement the district's clear policy against such use, and [that] the district promptly corrected these errors and took effective steps to prevent such a mistake in the future" (App. 22a).

The District Court also rejected the Church's claims under the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Religious Freedom Restoration Act as being identical to those rejected in Bronx Household (App. 25a).

Court of Appeals Decision

In a one sentence per curiam decision, the Second Circuit unanimously affirmed the judgment of the District Court "for substantially the reasons stated by Judge Haight in the decision below" 164 F.3d 829 (2d Cir. 1999) (App. 1a-2a).

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT WAS CORRECT IN AFFIRMING THE HOLDING OF THE DISTRICT COURT THAT PUBLIC SCHOOL 105 WAS A LIMITED PUBLIC FORUM, AND THAT THE EXCLUSION OF RELIGIOUS WORSHIP SERVICES FROM THAT FORUM WAS REASONABLE AND VIEWPOINT NEUTRAL.

The writ should be denied because the Court of Appeals correctly applied the teachings of this Court when it affirmed the holding of the District Court that P.S. 105 was a limited public forum and that the exclusion of religious worship services from that forum was reasonable and viewpoint neutral.

A. Public School 105 is, at Most, A "Limited Public Forum" Which Has Not Been Opened to Religious Worship Services.

The Church contends that Education Law section 414 and the Board's operating procedures, which implement section 414, violate the Church's First Amendment right to free speech by prohibiting it from leasing a public school building to conduct weekly religious worship services. Where a party claims that its right to free speech on public property has been violated, the first inquiry is whether the public property in question is: (1) a traditional public forum; (2) a designated public forum, either limited or not limited; or (3) a nonpublic forum. International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992).

A "traditional public forum" is "government property that has traditionally been available for public expression" such as parks and streets. Krishna Consciousness, 505 U.S. at 678. Regulations of speech on such property are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." Id.

A "designated public forum," is property that the State has opened for expressive activity by part or all of the public and either for all or certain subject matters. Id. A "designated forum" may be "limited" or "unlimited." Id. Where the designated forum permits unlimited speech for a specific group of people, the forum is treated like a traditional forum, where any restriction must be narrowly drawn to achieve a compelling state interest. Widmar v. Vincent, 454 U.S. 263 (1981). Where the designated forum is "limited," restrictions as to subject matter need only be "reasonable and viewpoint neutral." Rosenberger v. Rector Visitors of University of Virginia, 515 U.S. 819, 829 (1995) (with a limited designated forum "[t]he State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum' . . . nor may it discriminate against speech on the basis of its viewpoint").

All other public property falls into the category of "nonpublic forum" where a government's regulation of expressive activity "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Krishna Consciousness, 505 U.S. at 679.

This Court has recognized that a public school is not a traditional public forum. A school district, "like a private owner of property, may legally preserve the property under its

control for the use to which it is dedicated." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390 (1993). In Lamb's Chapel, this Court determined that "[c]ontrol over access" to a public school that has not been designated an open forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and viewpoint neutral.'" Id. at 392-93.

To succeed in its First Amendment claim, the Church must establish that New York State's access policy has created a either designated open forum or a limited public forum encompassing religious worship services. Section 414, on its face, does not create an open forum. By enumerating a list of permissible uses, the statute evinces a purpose to exclude all non-listed purposes. As this Court held in Cornelius v. NAACP Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985), the "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."

Nor does section 414 create a limited public forum open to religious worship services. See Trietley v. Board of Educ., 65 AD2d 1 (4th Dep't 1978). Section 414, first enacted in 1910, sets forth ten categories of uses which are permitted on school property. In addition to religious worship services, numerous other possible uses are not listed in the statute, including political meetings, commercial uses, labor union meetings, and the meetings of fraternal organizations, such as the Elks or Lions.

B. The School District Has Not Created an Open Forum Either Through the Board's Operating Procedures nor Through the District's Prior Practices

The Church studiously avoids arguing that the District allowed P.S. 105 to become an open forum through the District's past practices, even though that was the crux of its argument to the District Court and the Second Circuit and was the focal point of the District Court's discussion. Presumably the Church abandons this argument because it wants this Court to address the "pure" legal issue whether a school district may exclude religious worship services, rather than the fact-specific inquiry of whether this particular school district effectively closed its forum to religious worship services after inadvertently permitting several religious uses.

By not raising in its petition for certiorari the issue of prior religious uses, the Church has waived any arguments that such prior uses opened the forum to all religious worship services. In any event, as the District Court and the Second Circuit correctly found, once the District discovered that religious worship services had occurred inadvertently on school property, it took all necessarily steps to close the forum to future worship services (22a).

C. The Second Circuit's Decision in this Case is Not in Conflict with Any Prior Decision of this Court or any other Federal Court.

The Church errs when it argues that the Second Circuit's decision in this case conflicts with prior decisions of this Court and seven federal Circuit Courts of Appeal (Pet. at 9-11). The Church relies primarily on Widmar v. Vincent in

which the issue presented was the right of college students to meet for religious worship services on their own university campus. In contrast to the restriction-laden policy at issue here, the university in Widmar had created a truly open forum in which any legitimate student group was permitted to meet. See Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980), aff'd sub nom., Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, this Court characterized the university campus in Widmar as a "public forum." 454 U.S. at 270.

The Second Circuit in a prior decision upholding the exclusion of religious worship services in the public schools, Deeper Life Christian Fellowship, Inc. v. Board of Education, 852 F.2d 676, 679 (2d Cir. 1988), correctly distinguished the Widmar decision:

> Widmar, however, does not control the result here. As the Supreme Court pointed out in a later case, in Widmar it had "noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum," Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 . . . (1985), thereby subjecting attempts at regulating use of the property to the most exacting constitutional standards as to the forum's intended beneficiaries.

In reliance on footnote 6 in the Widmar decision, the Church also argues that religious worship services must be permitted wherever "religious speech" is allowed because, they argue, there is no distinction between the two (Pet. at 14). The problem with this argument is that it would open all limited public forums to religious worship services. Under

Lamb's Chapel and Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), a government which has opened a forum to speech on a particular subject-matter from a secular viewpoint, must also open the forum to speech on the same topic from a religious viewpoint. The Church argues that the forum must then be opened to religious worship services as well.

The absurdity of the Church's argument is demonstrated by an example: Once an elementary school invites a speaker to discuss any topic imaginable, for example, teen smoking, the school is required, under Lamb's Chapel, also to permit a discussion of the subject from a religious viewpoint. Under the Church's faulty syllogism, the school would then be obligated to permit outside groups to conduct religious worship services on school grounds because of the purported inability of a school district or court to distinguish between a discussion of teen smoking from a religious viewpoint and a religious worship service.

While the Second Circuit's decision may result in school districts and courts having to make difficult distinctions between religious worship services and other forms of religious speech, the special status given to religion and religious organizations by the Constitution and various federal and state laws render such line-drawing inevitable. For example, section 107 of the Tax Code, which exempts the rental value of a parsonage from a "minister of the gospel's" gross income, has required federal courts to examine whether a particular member of the clergy is performing religious worship services. Tanenbaum v. C.I.R., 58 T.C. 1 (1972) (holding that a rabbi employed by the American Jewish Committee was not entitled

to the section 107 exemption because he did not perform "any sacerdotal duties or conduct religious worship").[2]

Such line drawing arises in other contexts as well. For example, it is well-accepted that public school students may discuss religious materials from a historical or literary perspective, Abington School District v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J., concurring), or perform religious music, such as a Mozart requiem, at a school concert. On the other hand, it is also undisputed that public school students may not be subjected to state-sponsored prayer. Surely, the Church cannot seriously argue that discussions of religious material and the performance of religious music must be banished from the public schools because of the theoretical difficulty in drawing lines between such activities and religious worship services.

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[2] One may also note that Congress frequently provides that money earmarked for such purposes as education grants, facilities for the elderly, and child care block grants may not be used for programs involving religious worship or instruction. See, e.g., 20 U.S.C. § 1069c (certain grants to higher education institutions "may not be used . . . for . . . any religious worship or sectarian activity."); 42 U.S.C. § 3027(a)(14)(A)(iv) (requiring states seeking federal aid for construction of centers for the elderly to submit plans providing assurances that "the facilit[ies] will not be used and [are] not intended to be used for sectarian instruction or as . . . . place[s] for religious worship")' 42 U.S.C. § 9858k(a) (no child care or development block grants "shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

In any event, the facts of this case do not remotely approach any difficult boundary: The Church wishes to use the school as its house of worship. Absent evidence that the School District excluded the Church from expressing its views in the context of activities permitted within the limited public forum, the Church's claim must fail.

The Second Circuit's decision is also not in conflict with the other Circuit Court decisions cited by the Church (Pet. at 9-11).

For example, in Gregoire v. Centennial School District, 907 F.2d 1366 (3rd Cir. 1990), cert. denied, 498 U.S. 899 (1990), the Third Circuit struck down a policy excluding religious speech in the evening at public schools only because the policy also allowed religious speech in the afternoon. 907 F.2d at 1379.

Similarly, in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), cert. denied, 511 U.S. 1143 (1994), the Fourth Circuit struck down a policy under which the schools charged religious groups a higher rental fee than non-religious groups.

In Grace Bible Fellowship v. Maine School Admin. District No. 5, 941 F.2d 45 (1st Cir. 1991), the First Circuit struck down the practice of excluding, not religious services, but, instead, the use of the public school facilities by religious groups. The actual practice of the District prohibited religious groups from conducting the same activity (in that case, a community dinner) that a secular group would have been allowed to conduct.

Likewise, in Good News/Good Sports Club v. School Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995), the policy found unconstitutional banned after-school groups from engaging in "any speech or activity involving religious or religious belief." Again, this overbroad restriction was plainly at odds with the teaching of Lamb's Chapel.

And the Tenth Circuit's decision in Church of the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), cert. denied, 519 U.S. 949 (1996), the Court found that the City could not bar religious speech -- not religious worship services -- in publicly owned senior centers, because the senior centers had been designated public fora for lectures on any subject matter of interest to senior citizens.

In Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989), the Fifth Circuit correctly recognized that a public library's policy governing the use of its auditorium created a limited forum, but incorrectly applied the "compelling state interest" test in striking down the policy at issue. In light of this Court's subsequent decisions in Lamb's Chapel and Rosenberger, holding that such policies should be evaluated under a "reasonableness" test, the Fifth Circuit's decision in Concerned Women can no longer be considered good law.

Finally, there is nothing in any of the Seventh Circuit cases cited by petitioner remotely relevant to the issue of whether a church may conduct worship services on school property. See Grossbaum v. Indiannapolis-Marion County Building Auth., 63 F.3d 581 (7th Cir. 1995); Community Unit School Dist. No. 18, 9 F.3d 1295 (7th Cir. 1993); Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996).

D. The Exclusion of Religious Worship Services from Section 414's Enumeration of Authorized Uses of Public School Facilities is Reasonable and Viewpoint Neutral.

Once it is established that the school is neither a traditional public forum nor "a designated public forum open for indiscriminate public use," the standard to be applied to a subject matter based exclusion is whether "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Lamb's Chapel, 508 U.S. at 392-93. Accord Rosenberger, 515 U.S. at 829.

The exclusion of religious worship services is "reasonable" for the reasons outlined by the Second Circuit in Bronx Household of Faith, and the Church does not argue otherwise. It was reasonable for the State and the school district to seek "to avoid the identification of a [elementary] school with a particular church" and it was reasonable to "consider the effect upon the minds of [elementary] school children of designating their school as a church." 127 F.3d at 214. The State was also "reasonable" in limiting the use of school facilities to those programs which served children, education in general, or groups whose programs were aimed to serve the general public. Id.

Finally, as discussed more fully in subpart E below, the desire to keep the schools from becoming "symbolic[ally] link[ed]" with religion in violation of the concerns embodied in the Establishment Clause is also a legitimate policy reason which justifies the exclusion of religious services from public schools. Agostini v. Felton, 521 U.S. 203, 224 (1997).

E. Assuming, Arguendo, that P.S. 105 is an Open Forum, Compliance with the Establishment Clause is a Compelling State Interest Which Justifies the District's Refusal to Permit the Church to Conduct its Regularly Scheduled Services in that School.

Even if the District could be deemed to have created an open public forum, the exclusion of religious worship services is justified by the compelling state interest of compliance with the Establishment Clause. As a plurality of this Court recognized in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (plurality opinion), such an interest would justify a content-based restriction on speech in an open forum. Id. at 762:

> There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.

In Agostini, this Court reaffirmed that the Establishment Clause prohibits a government from "creat[ing] the impression of a 'symbolic union' between church and state." 521 U.S. at 227. The placement of a church in a school building would create more than just the impression of a symbolic union.

The Church sought to conduct religious worship services in a public elementary school on eight consecutive Sundays. However, the natural consequence of the Church's argument would require public schools to rent their facilities for regularly-scheduled church services without limitation. They would also require school districts to house church Sunday schools and even weekday after-school hours parochial education. A church might even ask to post a sign in front of

the school identifying the building as the location of the church, if only to assist guests attending a wedding or funeral. A church might seek to store items related to religious worship on school property. The inevitable result of the acceptance of the Church's argument in this case would be the actual, as well as the symbolic, union of Church and School.

The opening of the public schools to religious worship services would also inevitably result in school districts favoring some denominations over others. While theoretically, different religious groups could use different schools in a given district, in practice, given the number of major religious denominations in this country and given the special needs of some of these groups -- for example, the need to worship in walking distance of the member's homes -- there is no policy that a school district could adopt that would not discriminate against one group or another.[3]

This Court in Rosenberger suggested that a neutral "first-come, first-served" policy might avoid Establishment Clause problems in a given case, 515 U.S. at 843, but such a policy would not work here. If "first-come first-served" had been adopted three centuries ago, every school in New England would house the town's Congregational Church. Discrimination in favor of established sects and against newcomers would be the almost certain outcome of a first-come, first-served policy.

Indeed, any "neutral" policy that would give churches permanent use of public school facilities for regularly

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[3] See F. Mead, Handbook of Denominations in the United States, (8th ed. 1988) (identifying over 232 major religious denominations in the United States).

scheduled worship services would necessarily favor established religions, such as those that conduct services on Saturday and Sunday. Friday sabbath observers would be excluded from the State's largess, based only on the conflict between their religious beliefs and the public school schedule. In addition, established religious groups, because they are already favored with the closing of schools on their major holidays, such as Christmas and Easter would be further favored by the rule urged by the Church in this case. Established religions would be able to celebrate their holidays in subsidized school facilities, while less established religious groups would not.[4]

In Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995), which involved a challenge to the display of a cross by the Ku Klux Klan in an open forum in front of an Ohio courthouse, five Justices took the view, either explicitly or implicitly, that the Establishment Clause forbids a government practice neutral towards religion which would lead to the "realistic danger that the community would think that the [State] was endorsing religion or any particular creed." 515 U.S. at 772 (O'Connor, Souter and Breyer JJ., concurring); accord 515 U.S. at 787 (Souter, O'Connor and Breyer, JJ., concurring); 515 U.S. at 799 (Stevens, J., dissenting); 515 U.S. at 817-18 (Ginsburg, J., dissenting). While the four Justice plurality wrote that the "community" in question were only those individuals in the community who were aware of the town's policy creating a public forum, 515 U.S. at 765 (Scalia, J., plurality decision), this view appears to have been rejected by a majority of the Justices. Instead,

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[4] For example, in New York City, the Moslem holidays of Idul-Fitr and Idul-Adha are recognized for traffic regulation purposes, see 11 Rules of the City of New York, title 34, § 4-08, but are not public school holidays.

one must look to a reasonable observer in the community as a whole. 515 U.S. at 772-73; 515 U.S. at 787.

Following the majority view, one may conclude that a reasonable observer would view a church's permanent use of a public school facility as the school district's endorsement of that denomination, as well as of religion and religious worship in general.

These Establishment Clause concerns constitute a compelling state interest in maintaining the exclusion of religious worship services from public school buildings. Thus, even under the most exacting standard of review, the District's exclusion of regularly scheduled religious services does not violate the Church's First Amendment free speech rights.

II. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE FIRST AMENDMENT GUARANTEE OF FREE EXERCISE OF RELIGION.

The Church also argues that the public schools must be opened to religious worship under the Free Exercise Clause of the First Amendment (Pet. at 15). The Church would have this Court hold that any time a government opened public property to speech on any topic, the refusal to also permit religious worship on that public property would constitute a substantial burden on religious exercise.

New York State's decision not to include religious worship among the activities permitted on public school grounds does not place a substantial burden on the exercise of religion. See Braunfeld v. Brown, Commissioner of Police, 366 U.S. 599, 605-06 (1961) (plurality opinion) ("legislation which does not make unlawful the religious practice itself" is

at most an indirect burden on the exercise of religion). The Church is free to conduct their religious services anywhere else, and is free to conduct secular activities on public school grounds. Thus, this case bears no resemblance to those cited by the Church (Pet. at 15) where the exercise of certain practices by religious groups were outlawed in their entirety. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down prohibition of animal sacrifice during religious ceremonies); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (upholding prohibition on use of peyote during religious ceremonies).

III. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The threshold question in determining the validity of governmental action challenged as violative of equal protection is the applicable standard of review. Unless a policy creates a classification that operates to disadvantage a suspect class or interferes with the exercise of a fundamental right, a challenged policy will be examined under the rational basis test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

For the reasons stated elsewhere in this brief, petitioners have not stated a claim under the First Amendment, and, thus, no fundamental right is implicated by the State's exclusion of religious worship services from public elementary schools. Therefore, the rational basis test, not a strict scrutiny analysis, must be applied to petitioner's equal protection claims.

Official action that is challenged as denying equal protection "is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). As the Second Circuit has previously held in Bronx Household of Faith, it was reasonable for the State and the District to seek "to avoid the identification of [an elementary] school with a particular church" and it was reasonable to "consider the effect upon the minds of [elementary] school children of designating their school as a church." 127 F.3d at 214.

IV. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The Church also argues here that Section 414 violates the Establishment Clause of the First Amendment (Pet. at 16-19). The Church contends that the State's exclusion of religious worship services demonstrates hostility towards religion. As in its Free Speech argument, the Church takes the untenable position that once a public school opens itself to public discussion of any subject matter whatsoever, it must also allow religious worship services.

In evaluating a claim that a statute violates the Establishment Clause, this Court will look, inter alia, to whether the statute has the purpose or effect of "inhibiting religion." Agostini, 521 U.S. at 232-33. The Church has neither argued nor offered proof that the exclusion of religious worship services from the list of permissible uses of public school buildings was intended to inhibit the practice of religion. Moreover, there is no evidence that this prohibition -- in place since 1910 -- has had or will have an adverse effect on religious practice in the State of New York. As the Second

Circuit observed in Bronx Household of Faith, "it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school." 127 F.3d at 214.

For these reasons, Education Law § 414 and the School District's operating procedures do not violate the provisions of either the First or Fourteenth Amendment and, thus, were properly upheld by the Second Circuit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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(3)

No. 98-1714

IN THE
SUPREME COURT OF THE UNITED STATES

FULL GOSPEL TABERNACLE and JORGE VEGA,
Pastor of Full Gospel Tabernacle,

Petitioners,

v.

COMMUNITY SCHOOL DISTRICT 27, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This case presents the question whether a governmental body may deny a community group equal access to the use of its facilities for the sole reason that the intended use, while otherwise permissible, may be characterized as "religious services or religious instruction."

The petitioners -- a church and its pastor -- sought equal access to the use of school district facilities during nonschool hours. Respondents concede that churches are eligible speakers, Opp.[1] at 23 ("The Church is free . . . to conduct secular activities on public school grounds"), and that religion is a permissible subject matter, Opp. at 4 (school district regulation permits "the use of school premises by outside organizations . . . for the purpose of discussing religious material or material which contains a religious viewpoint") (quoting Standard Operating Procedures Manual [SOPM] section 5.9; see App. 34a), for after-hours use of school district facilities. Respondents also concede that they denied equal access to petitioners for the sole reason that petitioners' intended expressive activity could be characterized as worship, Opp. at 2 (access "was denied because of the Board's policy prohibiting the use of school facilities for religious worship services"). In short, respondents excluded an otherwise permissible expressive use (speech, music, instruction) because of its forbidden religious perspective (viz., that of worship). See generally Pet. at 7-8.

By upholding this blatantly unconstitutional discrimination, the Second Circuit rendered a decision in square

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[1] "Opp." refers to the Brief in Opposition. "Pet." refers to the Petition for Certiorari. "App." refers to the Appendix to the Petition.

conflict with decisions of the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits, Pet. § I, and in square conflict with the decisions of this Court, Pet. § II. Respondents' brief in opposition, if anything, only highlights the need for Supreme Court review.

1. Conflict in the Circuits

The respondents deny, with in essence an ipse dixit, the existence of a conflict between the decision below and the decisions of other federal circuits. Indeed, respondents scarcely do more than list the conflicting cases and describe (often incorrectly) their holdings.

For example, respondents note that in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir.), cert. denied, 511 U.S. 1143 (1994), the Fourth Circuit "struck down a policy under which schools charged religious groups a higher rental fee than non-religious groups," Opp. at 16. But respondents fail to note that the issue in Fairfax Covenant was whether a school board could, consistent with the Constitution, deliberately discourage (by discriminatory rental rates) long-term use of school facilities for church worship services. See 17 F.3d at 707-08. The Fourth Circuit held that the Constitution neither required nor permitted discrimination against church access to school facilities for worship services. Id. at 706-09. In direct conflict with Fairfax Covenant, the Second Circuit below approved the discriminatory total exclusion of worship services from after-hours use of school facilities.

To take a second example, respondents badly mischaracterize Gregoire v. Centennial School District, 907 F.2d 1366 (3d Cir.), cert. denied, 498 U.S. 899 (1990).

Respondents would treat Gregoire as merely holding that if a school allows "religious speech in the afternoon," then it must also allow "religious speech in the evening," Opp. at 16. In fact, Gregoire held that both religious speech and worship services fall within the right to equal access to school facilities after hours. The "speech in the afternoon," upon which respondents focus, was a forum for students under the Equal Access Act, see 907 F.2d at 1373, a federal statute that applies with equal force to respondents. See generally Board of Educ. v. Mergens, 496 U.S. 226 (1990). More importantly, the Gregoire court rejected the central premise of the decision below. Respondents' discriminatory exclusion of religious worship, but not religious speech, requires (as respondents concede) school districts "to make difficult distinctions between [forbidden] religious worship services and [permitted] other forms of religious speech," Opp. at 14. The Second Circuit in the present case approved discrimination based on this supposed distinction between religious worship and religious speech. App. 2a, 21a n.9, 24a. The Gregoire court explicitly rejected the this very same distinction:

> Attempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring [the school district] to entangle itself in what would almost certainly be complex content-determinations.

907 F.2d at 1382. Hence, the conflict with the Second Circuit's decision below could not be more patent.

2. Conflict with the Supreme Court

The Second Circuit below upheld the discriminatory exclusion of otherwise includible expressive activities (singing,

meeting, discussing religious topics) conducted by an otherwise eligible community group (petitioner church) for the sole reason that the expressive activities would be undertaken from the perspective of offering worship to God. The Second Circuit's condoning of such governmental hostility to core religious speech and exercise runs directly contrary to this Court's decisions in the areas of free speech, free exercise of religion, freedom from hostility to religion under the Establishment Clause, and freedom from invidious discrimination under the Equal Protection Clause. See Pet. § II.

a. Parade of horribles

Respondents seek primarily to defend the decision below by pointing to a supposed parade of horribles. According to respondents, if governmental discrimination against private worship services is unconstitutional, then all schools that allow any outside speakers must allow church services as well. E.g., Opp. at 13, 14, 19-20, 22, 24. Respondents employ fallacious reasoning.

First of all, a school need not open its facilities to outside users at all. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 391 (1993) ("the District need not have permitted after-hours use of its property for any of the [authorized] uses"). Second, if a school invites a particular speaker -- for example, an opponent of teen smoking, Opp. at 14 -- that speaker acts as an agent of the school, and no forum is thereby created for private speech (e.g., a defense of smoking). Rosenberger v. Rector of University of Virginia, 515 U.S. 819, 833 (1995) ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message"). Third, fears about perpetual church use of school

facilities, Opp. at 19-20, represent a red herring: schools can certainly impose neutral limitations on the duration or frequency of uses, i.e., so long as those restrictions do not single out religious speech or worship for unique disabilities.

School districts enjoy considerable flexibility in determining what access to allow to their facilities after school hours. What school districts may not do, however, is employ illegitimate criteria to deny equal access. By telling users they may sing religious songs so long as they do not do so from the perspective of worshipers, or that they may teach about Scripture so long as they do not do so from the perspective of a preacher or a catechist, respondents in this case have stepped from permissible forum regulation into unconstitutional discrimination.

b. Establishment Clause fears

Respondents profess grave concern at the prospect of school facilities being used for worship. Opp. at 18-22. This concern has no legal basis and thus can only reflect a persistent prejudice against religious speech.

In Widmar v. Vincent, 454 U.S. 263 (1981), this Court reaffirmed the basic proposition that religious worship, like other religious speech, enjoys constitutional protection, id. at 269. See generally Pet. at 13. While Widmar concerned university facilities, this Court subsequently ruled that allowing high school students to meet in school facilities during school days to "read and discuss the Bible, to have fellowship, and to pray together," Mergens, 496 U.S. at 232 -- i.e., to engage in religious services -- presented no Establishment Clause difficulties, id. at 248-53. A fortiori, the Establishment Clause does not justify discriminatory censorship of worship outside

the school day when community users are otherwise permitted access for the very activities in question (speaking, reading religious materials, singing, sharing concerns).

c. Forum analysis

As this Court has held, the denial of equal access on the basis of a speaker's religious perspective violates the Constitution regardless of forum analysis. Lamb's Chapel, 508 U.S. at 391-92. Here, the unconstitutional viewpoint discrimination is manifest. A community group may mockingly present a worship service (say, in an anti-religious play or lecture), but may not do so from the perspective of believers offering praise to God. A group of devotees may hold a gathering with songs and readings to honor John Lennon, but not Jesus Christ. An instructor may "proselytize" (i.e., teach adherence to) Communism or Deconstructionism, but not Judaism or Islam. Plainly, no forum analysis is needed to show the unconstitutionality of respondents' discriminatory policy.

Respondents therefore err badly when they claim that, "[t]o succeed . . . , the Church must establish that [the] access policy has created a either [sic] designated open forum or a limited public forum encompassing religious worship services," Opp. at 11. As explained above, forum analysis is superfluous. Moreover, respondents' presentation of the issue suffers from multiple analytical defects. First, the petitioner church is undisputably an eligible user, and its planned use undisputably comprises permissible activities (speech, music, teaching). Hence, the question is not whether the forum is open to the use in question -- it clearly is -- but rather whether respondents may bar that use because of its religious aspect (i.e., that the activities will be undertaken from the perspective of believers offering worship). Second, respondents beg the very question:

according to respondents, an excluded user must prove that religious worship is permitted before religious worship will be permitted. See Opp. at 11. Third, respondents ignore the evidence that the school district has approved thousands of community uses, see Pet. at 3-4 (listing examples), evidence which indicates that respondents have indeed created a virtually limitless designated public forum.[2] Thus, with or without forum analysis, respondents' exclusion of certain religious speech runs afoul of the Constitution. Widmar, 454 U.S. at 267-77.

Under the Second Circuit's ruling in this case, the constitutional right to equal access does not apply to religionists in the Second Circuit's jurisdiction. School districts (and courts) must shoulder the unconstitutional burden of identifying and enforcing a difference between religious speech and religious worship, between religious instruction and instruction about religion. Residents face unconstitutional discrimination based on the content and viewpoint of their speech. And the Second Circuit remains at odds with not only the other federal circuits but also the teachings of this Court.

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[2] Respondents assert that "political meetings" and "labor union meetings" are not expressly permitted under the governing New York law. Opp. at 11. But the undisputed facts show that respondents approved both union meetings and a political meeting (a town hall meeting with then-Congressman Shumer) in school facilities. See Pet. at 4; App. at 6a n.3. Hence, respondents' contention illustrates that access to the forum is, if anything, even broader than might otherwise appear.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

FULL GOSPEL TABERNACLE AND JORGE VEGA,

Petitioners,

v.

COMMUNITY SCHOOL DISTRICT 27, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, QUEENS FEDERATION OF CHURCHES, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, LIBERTY COUNSEL, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND NORTH AMERICAN MISSION BOARD, SOUTHERN BAPTIST CONVENTION, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether government officials, contrary to this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), may deny access to a community group solely because its speech includes religious worship and instruction.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The letters of the parties granting their consent to the filing of this brief have been filed with the Clerk. A complete statement of interest for each *amicus curiae* is included in the appendix.[1]

Several of the *amici* are religious organizations that have a longstanding interest in protecting equal access for private religious speakers to public facilities. *Amici* Christian Legal Society, Baptist Joint Committee on Public Affairs, National Association of Evangelicals, and Presbyterian Church (U.S.A.) have worked to secure the right of equal access for nearly two decades. Several of the *amici* have member congregations or other religious affiliates in New York, Vermont, and Connecticut, that are likely to be harmed in the near future by the discriminatory policy approved in the decision below.

SUMMARY OF ARGUMENT

The issue presented, whether government officials may deny access to a community group solely because its speech includes religious worship and instruction, is controlled by this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court ruled that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Id.* at 269.

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[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amicus* Christian Legal Society received a grant from the Alliance Defense Fund to cover its expenses in producing this brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the content of the brief.

This Court specifically rejected the premise of the courts below that religious worship and instruction may be segregated from other speech for discriminatory exclusion. This Court repudiated the argument that government officials could distinguish religious worship or instruction from other types of speech because the distinction:

1) lacks "intelligible content" (*id.* at 269 n.6);

2) is inadministrable by government officials (*id.* at 269-270 n.6, 271 n.9);

3) creates a risk of excessive entanglement between government officials and religion in determining which religious speech is permissible and which religious speech is impermissible (*id.* at 272 n.11); and

4) is irrelevant (*id.* at 270 n.6).

Free speech protection of religious instruction and worship has been reaffirmed in numerous decisions by this Court before and since *Widmar*. *See, e.g., Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Moreover, the courts below affirmed a policy that *on its face* discriminates against community groups wishing to engage in religious worship or religious instruction, a blatant violation of the governmental neutrality required by both the Free Exercise Clause and the Establishment Clause. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990); *McDaniel v. Paty*, 435 U.S. 618 (1978). The Free Exercise Clause prohibits government officials from penalizing conduct done for religious reasons while allowing the same conduct done for secular

reasons. *See Lukumi*, 508 U.S. at 534-537. Furthermore, the Establishment Clause is violated by government officials' attempts to sever religious worship or instruction from other speech, because such attempts result in an excessive entanglement of government officials with religion. *Widmar*, 454 U.S. at 272 n.11.

Most troubling, the decisions below sanction governmental discrimination among religions, favoritism the Establishment Clause vigilantly prohibits. *See Larson v. Valente*, 456 U.S. 228 (1982). Despite undisputed record evidence that previous uses by other religious groups for worship and instruction had been permitted, the courts below upheld the school officials'[2] denial of access to Full Gospel Tabernacle. (App.[3] 17a-22a).

The Second Circuit's decisions below also threaten the religious speech rights of citizens living outside the Second Circuit. Earlier decisions of the Second Circuit have been particularly damaging to the equal access right of private religious speakers. For example, the Second Circuit's decision in *Brandon v. Guilderland Central Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), triggered a nationwide suppression of high school students' extracurricular religious speech. An Act of Congress, the Equal Access Act, 20 U.S.C. § 4071 (1994), and a decision by this Court, *Board of Education v. Mergens*, 496 U.S. 226 (1990), were necessary to repair the extensive

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[2] School officials in this case include school custodians, who in some schools apparently make the initial decision whether a group's meetings violate the policy against religious worship or instruction. App. at 9a ("Typically, an application to use school facilities after school hours is first reviewed by the custodian and the principal for the school which the organization seeks to use."), 10a, 21a.

[3] "App." references pages in the Appendix of the Petition for Writ of Certiorari filed in this case.

damage done to religious speech by the *Brandon* decision. *See also Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *rev'g*, 959 F.2d 381 (2d Cir. 1992) (denying equal access to religious community group seeking access to school auditorium during evenings and weekends).

The decisions below rest upon a 1997 Second Circuit decision denying equal access to community groups seeking weekend access to school facilities for religious worship and instruction, *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998). The Second Circuit's decisions are being used by government officials beyond the Second Circuit to justify discriminatory treatment of religious community groups. *See DeBoer v. Village of Oak Park*, 1999 WL 104726, *4 (N.D.Ill. Feb. 23, 1999) ("Had we been presented with the facts of *Bronx Household*, we would have reached the same conclusion."), *on appeal*, No. 99-1706 (7th Cir. 1999).

Amici respectfully suggest that the decision below meets the criteria for summary reversal because the decision below presents an issue clearly controlled by this Court's authority in *Widmar v. Vincent*. In the alternative, *amici* respectfully request that this Court grant the petition for writ of *certiorari*.

ARGUMENT

I. The decisions below are directly contrary to the controlling authority of this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

The decisions below[4] cannot be reconciled with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981),

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[4] We refer to "the decisions below" because the Second Circuit decision below consists of a single sentence affirming

in which this Court rejected a state university's attempt to prohibit a student group from meeting solely because the group wished to engage in religious worship or instruction. Numerous decisions by this Court before and after *Widmar* have protected citizens' religious speech, including worship and instruction. Forty years before *Widmar*, the Court held that a government official could not exercise unbridled discretion to determine whether private citizens' speech was religious. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This bedrock principle was also applied in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), when this Court rejected a city ordinance that had been interpreted to allow "religious services" in a park but not "religious addresses." In *Fowler*, this Court stated that it was not "in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id.* at 70. Finally, *Widmar* has been the basis of several decisions by this Court and lower federal courts protecting private religious expression, with which the decisions below conflict.

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the judgment of the district court for "substantially the reasons stated by" the district court. (App. 2a). The Second Circuit could be so succinct in this case because the district court relied upon the Second Circuit decision in *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998), in which the Second Circuit approved the discriminatory denial of equal access to community groups for religious worship or instruction.

A. In *Widmar*, the Supreme Court rejected a policy essentially identical to the school district policy in this case and ruled that groups seeking to meet for religious worship and religious instruction may not be discriminatorily denied access.

As in this case, in *Widmar*, public university officials did not deny *all* access to a religious group but *conditioned* access upon the group agreeing not to use the university facilities for "religious worship" or "religious teaching." 454 U.S. at 265, 266 n.3. Indeed, the University had "routinely approved" access to university facilities for the student religious group for a number of years. *Id.* at 266 n.3. The University denied the student religious group continued access only after the University realized that the group's meetings included religious worship and religious teaching. *Id.* The University then concluded that the students' meetings violated its policy "prohibit[ing] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.' " *Id.* at 265.

Like the university officials in *Widmar*, the respondent school district has denied access to school facilities during nonschool hours to a community group solely because the group's speech would include religious worship and religious instruction. While it allows the group to distribute religious literature or discuss religious material at its meetings, the school district policy, Standard Operating Procedure ("SOP") 5.9, prohibits religious services or instruction, stating:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or

> material which contains a religious viewpoint or for distributing such material is permissible.

App. 34a.

In *Widmar*, the Supreme Court held such a policy unconstitutional because it violated "the fundamental principle that a state regulation of speech should be content-neutral." 454 U.S. at 277. *Accord Rosenberger v. University of Virginia*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.")

In *Widmar*, the Supreme Court specifically ruled that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." 454 U.S. at 269, *citing Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948). Most recently, noting that "government suppression of speech has so commonly been directed precisely at religious speech," this Court reiterated that freedom of speech protects "even acts of worship." *Capitol Square Review Board v. Pinette*, 515 U.S. 753, 760 (1995), *citing Widmar*, 454 U.S. at 269 n.6.

In *Widmar*, this Court rejected the argument that religious worship can be distinguished from other religious speech and discriminatorily excluded from public facilities for four reasons:

1. The distinction lacks "intelligible content." A distinction between "religious worship and instruction" and other speech lacks "intelligible content" because, as this Court explained in *Widmar*:

> There is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading' – all apparently forms of 'speech,' despite

> their religious subject matter – and become unprotected 'worship.'

454 U.S. at 269 n.6 (citation omitted). *See Rosenberger*, 515 U.S. at 845. *See also Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534-537 (1993) (government violates Free Exercise Clause when it prohibits conduct done for religious reasons while allowing similar conduct done for secular reasons).

2. The distinction is inadministrable by government officials. In *Widmar*, this Court concluded that government officials should not be making the inquiries necessary to administer a distinction between religious worship or instruction and other speech. Indeed, this Court "doubt[ed] that it would lie within the judicial competence to administer" a distinction between "religious worship" and other "religious speech," (454 U.S. at 269 n.6), and characterized the distinction as "judicially unmanageable," (*id.* at 271 n.9). As this Court explained:

> Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Id. at 269 n.6 (citations omitted). *See also Rosenberger*, 515 U.S. at 845.

Similarly, in *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), this Court rejected a city ordinance that had been interpreted to allow "religious services" in a park but not "religious addresses." This Court characterized government officials' determination that speech was a "sermon" as opposed to an "address" as "merely an indirect way of preferring one religion over another." *Id.* at 70. This Court stated that it was not "in the competence of courts under

our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id.*

Similarly, in its landmark decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that government officials may not exercise unbridled discretion to determine whether speech is or is not religious. As Justice Souter has remarked, it is hard to "imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than determinations about the religious content of speech. *Lee v. Weisman*, 505 U.S. 577, 616-617 (1992) (Souter, J., concurring). *See also Employment Division v. Smith*, 494 U.S. 872, 889-890 n.5 (1990) (federal judges should not "regularly balance against the importance of general laws the significance of religious practice"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.").

3. The distinction will result in excessive entanglement between government officials and religion. Inquiries by government officials trying to administer a distinction between religious worship and other religious speech "would tend inevitably to entangle the State with religion in a manner forbidden by [this Court's] cases." *Widmar*, 454 U.S. at 269-270 n.6. Excessive entanglement would result because government officials "would need to determine which words and activities fall within 'religious worship and religious teaching.' " *Id.* at 272 n.11. The Court suggested such determinations were "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Id.* (quotation marks and citation omitted).

Again, in *Rosenberger*, this Court condemned such decisionmaking by government officials as raising "the specter of governmental censorship." 515 U.S. at 844. The Court continued:

> As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 845.

Beyond the "impossible task" of determining which words constitute "religious worship and religious teaching," the Court in *Widmar* recognized that application of such a policy would create "a continuing need to monitor group meetings to ensure compliance with the rule." 454 U.S. at 272 n.11. *See also Board of Education v. Mergens*, 496 U.S. 226, 248, 253. This continual supervision of religious groups' meetings is itself the quintessential example of unconstitutional excessive entanglement.

Because the school district policy in this case is essentially identical to the university policy struck down in *Widmar*, it creates the same excessive entanglement between school district officials and religion. In its overly zealous attempt to avoid an Establishment Clause violation, the court below infringed upon the Establishment Clause by permitting government officials to implement a policy distinguishing between "religious discussions" and "religious services or instruction."

4. The distinction is irrelevant for constitutional purposes. In *Widmar*, this Court stated:

> [There is] no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted.

454 U.S. at 270 n.6 (citation omitted). In a long line of pre-*Widmar* precedent, the Court has held that the First Amendment protects private speech for purposes of proselytizing persons of other faiths, or persons of no particular faith.[5] In *Widmar*, this Court saw no valid reason for distinguishing these numerous precedents in order to give less protection to religious worship and instruction among members of the same faith. In other words, religious worship and instruction among members of the same faith should be *at least* as protected as religious speech (such as religious literature distribution) to persons who do not agree with, and often object to, a particular religious message.

Ironically, in the Second Circuit, worship exercises by *student* religious groups immediately before or after school on public secondary school campuses must be permitted, while worship exercises by *community* religious groups on weekends are discriminatorily excluded from the same schools. *Compare Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996) (the Equal Access Act, 20 U.S.C. § 4071

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[5] See, for example, *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (religious speech in park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Kunz v. New York*, 340 U.S. 290 (1951) (denunciation of religion on public streets); *Saia v. New York*, 334 U.S. 558 (1948) (amplification of religious speech in public park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (religious solicitation); *Tucker v. Texas*, 326 U.S. 517 (1946) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Largent v. Texas*, 318 U.S. 418 (1943) (religious literature distribution); *Jamison v. Texas*, 318 U.S. 413 (1943) (same); *Martin v. Struthers*, 319 U.S. 141 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious solicitation); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (religious literature); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (same).

(1994), protects secondary student religious meetings for religious worship and instruction) *with Bronx Household of Faith v. Community School District*, 127 F.3d 207, 213 (distinguishing Equal Access Act cases, including *Hsu*, to deny equal access on weekends to community group for religious worship and instruction), *cert. denied*, 118 S. Ct. 1517 (1998).[6]

B. The decisions below conflict with numerous decisions by this Court and lower federal courts protecting equal access for private religious expression.

This Court's decision in *Widmar* rests on numerous earlier decisions requiring government to be neutral in its treatment of citizens' religious speech. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *cf., McDaniel v. Paty*, 435 U.S. 618 (1978) (prohibiting discriminatory treatment based on religious profession). And *Widmar* is the bedrock for this Court's important subsequent decisions in *Board of Education v. Mergens*, 496 U.S. 226 (1990) (applying *Widmar* to uphold constitutionality of Equal Access Act, 20 U.S.C. § 4071 (1994), requiring equal access for student religious groups for prayer and Bible study

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[6] The United States Secretary of Education has advised school superintendents that student religious groups' meetings for religious worship and instruction are protected in public secondary school facilities, as follows:

> *Prayer services and worship exercises covered:* A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Religious Expression in Public Schools, Department of Education, Letter from Secretary Richard Riley (August 10, 1995).

on public secondary school property); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (applying *Widmar* to protect equal access for community religious group to public school facilities that were assumed to be a nonpublic forum); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (applying *Widmar* to require equal access for a student religious publication to university student funding program, treating the program as a "limited public forum"); *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995) (applying *Widmar* to uphold equal access for self-defined religious speakers in a public forum).

This Court's decision in *Widmar* is also the foundation for numerous lower court decisions protecting the right of equal access for private religious expression. *Amici* agree with Petitioners' argument that the decision below directly conflicts with the decisions of other circuits, particularly in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), and *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994). *See also Good News/Good Sports Club v. Ladue Sch. Dist.*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Grace Bible Fellowship v. Maine School Admin. Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir.), *cert. denied*, 498 U.S. 899 (1990); *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989).[7]

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[7] Numerous additional federal appellate decisions have relied upon the *Widmar* analysis to protect equal access for private religious expression to public school property in a variety of contexts. *See, e.g., Ceniceros v. Board of Education of San Diego Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997); *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993); *Sherman v. Community Sch. Dist.*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied*, 511

Widmar is the controlling authority for the issue presented by this case: whether government officials may deny access to a community group solely because its speech includes religious worship or religious instruction. By refusing to apply *Widmar*, the decision below conflicts with numerous precedents of this Court and lower federal courts.

C. The decisions below are directly contrary to this Court's Establishment Clause and Free Exercise Clause decisions requiring government officials to treat religion in a neutral manner.

The discriminatory treatment of private religious speakers sanctioned by the decisions below violates the core requirement of the Establishment and Free Exercise Clauses that government officials treat religion in a neutral manner. As the Court explained in *Mergens*:

> [I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. 'The Establishment Clause does not license government to treat religion and those *who teach or practice it*, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.'

U.S. 1110 (1994); *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir.), *cert. denied*, 510 U.S. 819 (1993); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993). *See also Shumway v. Albany County Sch. Dist.*, 826 F. Supp. 1320 (D. Wyo. 1993); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991); *Youth Opportunities Unlimited v. Bd. of Educ.*, 769 F. Supp. 1346 (W.D. Pa. 1991); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983).

496 U.S. at 248 (plurality opinion) (emphasis added), *quoting McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring in judgment).

1. A government policy that on its face discriminates against religious persons violates the Free Exercise Clause and the Establishment Clause. In determining whether government officials have violated the Free Exercise Clause, this Court begins by examining the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law that is not neutral toward religion on its face must be justified by a compelling governmental interest narrowly tailored to advance that interest. *See Employment Division v. Smith*, 494 U.S. at 886 n.3; *Lukumi*, 508 U.S. at 531-532. Similarly, in Establishment Clause analysis, this Court examines statutes for facial neutrality toward religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985).

The school district policy fails this minimal requirement of facial neutrality because it explicitly states that community groups wishing to engage in religious services or instruction will be automatically denied access. *See also Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 707 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994) (school board policy that discriminatorily charged churches higher rental than other community groups for access to school facilities after school hours violated free exercise rights of church).

2. A government policy that discriminates against conduct done for religious reasons while allowing the same conduct done for secular reasons violates the Free Exercise Clause. This Court has held that a governmental policy that creates an anti-religion gerrymander, by prohibiting conduct undertaken for religious purposes while

allowing the same conduct when done for secular purposes, violates the Free Exercise Clause. *Lukumi*, 508 U.S. at 532. The anti-religion gerrymander in this case is explicit. Not only does the text of the policy discriminate against religious speech, but the policy is applied in a discriminatory manner. Community groups are allowed access for "the purpose of instruction in any branch of education, learning or the arts," but access for *religious* instruction is denied. *Compare* SOPM 5.6.1 *with* SOPM 5.9 (App. 33-34a). Singing is allowed unless it is for the purpose of religious worship. Drama is allowed unless its purpose is religious instruction. Speaking is allowed unless it is for worship or religious instruction. This is a blatant violation of the Free Exercise Clause. *Lukumi*, 508 U.S. at 534-537.

3. The decisions below permit differential treatment by government officials among religious groups, a basic violation of the Establishment Clause. Allowing government officials to determine whether speech is "religious worship or instruction" provides fertile ground for discrimination among religions, which the Establishment Clause prohibits. *Fowler v. Rhode Island*, 345 U.S. at 70 (distinguishing between religious "sermon" and "address" is "merely an indirect way of preferring one religion over another"). Government officials' review of the religious content of speech "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires". *Rosenberger*, 515 U.S. at 845-846. *See also Larson v. Valente*, 456 U.S. 228 (1982).

Precisely such discrimination has been permitted by the decisions below, in which the school district denied access to a church for worship and instruction despite undisputed record evidence that the school district previously had allowed two other churches access for religious

worship and instruction. App. at 17a-22a. Community groups were also allowed access to school facilities for gospel concerts and a religious party. App. at 6a n.3. *See also* Note, *First Amendment – Public Forum – Second Circuit Holds that Middle School Auditorium is not a Public Forum and that Exclusion of Religious Activities is Permissible*, 111 Harv. L. Rev. 1608, 1613 (1998) (criticizing "circular argument [of *Bronx Household*] [that] would empower the School District to act as a censor").

4. The decisions below will require school officials to determine whether religious speech is religious worship, religious instruction, or "permissible" speech, in violation of the Establishment Clause. Finally, as discussed *supra* at pp. 9-10, in *Widmar*, this Court noted that a policy prohibiting religious worship and instruction was likely to create excessive entanglement between government officials and religion, an additional violation of the Establishment Clause. 454 U.S. at 272 n.11. *See Mergens*, 494 U.S. at 248, 253; *Rosenberger*, 515 U.S. at 844-845.

In this case, community groups were allowed access to school facilities for gospel concerts and a religious party. App. at 6a n.3. School officials will be required to determine whether gospel concerts, religious parties, religious dinners, and other community uses, involve religious worship or religious instruction. *See, e.g., Travis v. Owego-Apalachin School District*, 927 F.2d 688, 693 (2d Cir. 1991) (school officials' confusion whether community group's Christmas program was religious); *Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207, 1218 (D. Kan. 1983) (school officials' confusion about the permissibility of various community groups' activities with religious components).

II. Past Second Circuit decisions denying equal access for private religious speakers have had a negative national impact on religious citizens' free speech rights.

The decision below must be placed in context in order to understand the threat it poses to the free speech rights of citizens living outside, as well as within, the Second Circuit. A previous Second Circuit decision was singularly damaging to equal access for private religious expression. *Brandon v. Guilderland Central Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). In *Brandon*, the Second Circuit ruled that a school district would violate the Establishment Clause if it permitted a student religious group to meet for prayer and Bible study in an empty classroom before school began. *Id.* at 979. Distinguishing "prayer" from "discussions about religious matters," the Second Circuit ruled that "the protections of political and religious speech are inapposite" for students meeting for prayer. *Id.* at 980 (citations omitted).

Fueling a decade of equal access litigation, the *Brandon* decision was followed by other courts of appeals to deny equal access for high school students engaging in religious speech, including prayer and worship. *See Garnett v. Renton Sch. Dist.*, 865 F.2d 1121 (9th Cir. 1989) (relying on *Brandon* to hold Equal Access Act unconstitutional), *vacated*, 496 U.S. 914 (1990), *on remand*, 987 F.2d 641 (9th Cir.) (relying on *Mergens*, Equal Access Act requires equal access for high school student religious group), *cert. denied*, 510 U.S. 819 (1993); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 551-557 (3d Cir. 1984) (citing *Brandon*, Establishment Clause trumps free speech right of high school student group to meet for religious speech, including prayer and Bible study), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669

F.2d 1038, 1045-1046 (5th Cir. 1982) (relying on *Brandon* to rule that school district policy allowing equal access for religious student groups would violate the Establishment Clause), *cert. denied*, 459 U.S. 1155-1156 (1983).

Ultimately, an Act of Congress, the Equal Access Act, 20 U.S.C. § 4071 (1994), and a decision by this Court, *Board of Education v. Mergens*, 496 U.S. 226 (1990), were necessary to repair the damage done to religious speech by the *Brandon* decision. *Mergens*, 496 U.S. at 239 (Equal Access Act "enacted in part in response to" *Brandon*), *citing* S. Rep. No. 98-357 at 6-9, 11-14 (1984) (describing damage done across the country by the *Brandon* decision).

Again, in 1993, this Court unanimously reversed the Second Circuit in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), to uphold the right of access to a public school auditorium during non-school hours for a church to show a film series with religious content. Because this Court reviewed and reversed the Second Circuit decision quickly, the potential damage of *Lamb's Chapel* was contained. *See, e.g., Good News/Good Sports Club v. Ladue Sch. Dist.*, 859 F. Supp. 1239 (E.D. Mo. 1993) (citing Second Circuit decision in *Lamb's Chapel*, court denied access to religious community group for after-school use on same basis as another community group), *rev'd*, 28 F.3d 1501 (8th Cir. 1994) (relying on Supreme Court decision in *Lamb's Chapel*, court required access for religious community group to school facilities after-school on same basis as another community group), *cert. denied*, 515 U.S. 1173 (1995).

If allowed to stand, the decision below is likely to have negative repercussions for private religious expression across the country. The Second Circuit's decision in *Bronx Household*, which is the basis of the decisions below, has been used by government officials outside the Second Circuit to justify their discriminatory treatment of private religious speakers. *See DeBoer v. Village of Oak Park*, 1999 WL 104726, *4 (N.D.Ill. Feb. 23, 1999) ("Had we been

presented with the facts of *Bronx Household*, we would have reached the same conclusion."), *on appeal*, No. 99-1706 (7th Cir. 1999).

CONCLUSION

The decision below is directly contrary to this Court's decision in *Widmar*. The decision below is entirely inconsistent with numerous decisions by this Court under the Free Speech, Free Exercise and Establishment Clauses, requiring government officials to treat religious citizens in a neutral manner. The decision below threatens the stability and correct application of a long line of precedents of this Court and lower federal courts, upholding the right of equal access for private religious expression.

Amici respectfully suggest that this case is one of the exceptional cases in which it would be appropriate for the Court to grant the petition for writ of *certiorari* and summarily reverse the ruling of the court below. In the alternative, *amici* urge this Court to grant the petition for writ of *certiorari* for full argument before this Court.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the **Christian Legal Society** ("CLS"), through the **Center for Law and Religious Freedom** (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by

the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Queens Federation of Churches, Inc.**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 290 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation of Churches and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty, believing that governmental hostility to and discrimination against religious speech and religious worship, as in the present case, are

egregious offenses against citizens which can only breed more destructive intolerance.

The **Union of Orthodox Jewish Congregations of America** (the "U.O.J.C.A.") is a non-profit synagogue organization for over 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the mainstream Orthodox Jewish community. The U.O.J.C.A. has filed briefs in federal and state courts throughout the nation in cases that affect the interests of the Jewish community and American society at large.

The U.O.J.C.A. has been particularly active and interested in cases that center upon the role of religion in our society and the interpretation and application of the Establishment and Free Exercise clauses in that regard. It has been the consistent position of the U.O.J.C.A. that the Establishment Clause does not require government to disfavor religion in any way. Thus, the U.O.J.C.A. joins in this brief for it believes that the court below erred in its interpretation of what the Establishment Clause requires.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the **Presbyterian Church (U.S.A.)**. The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 15 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Presbyterians have long supported the separation of Church and State. It was Presbyterians that sought this separation at the founding of this Nation. However in its 1988 policy statement, *God Alone is Lord of the Conscience*, the 200th General Assembly adopted a policy that said: "Religious speech and assembly by private citizens and organizations, initiated by them, is protected both by the Free Exercise of Religion and Free Speech clauses of the Constitution and cannot be excluded from public places." The Stated Clerk urges this Court to accept jurisdiction over this very important matter.

The **Church of Jesus Christ of Latter-day Saints** is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 10.5 million with more than 25,000 congregations located throughout the world.

Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping almighty God according to the dictates of our own conscience and allow all men the same privilege let them worship how, where, or what they may." Article of Faith, No. 11.

The **Baptist Joint Committee on Public Affairs** is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensure the religious liberty of all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptists Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptist through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The **National Association of Evangelicals** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **Family Research Council** is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and

analysis for the legislative, executive, and judicial branches of the federal government, the Council seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

Our legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on the unique relationship between parents and their children. Our expertise has been of particular importance to members of the United States Congress.

Throughout its fifteen-year history protecting the interests of mothers and children in the context of abortion has been of particular importance to the Family Research Council. The Family Research Council has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts. Charles A. Donovan is the Executive Vice President and acting C.E.O. Janet M. LaRue is the Senior Director of Legal Studies.

Focus on the Family is a California religious nonprofit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week and represents Americans numbering in the hundreds of thousands.

Liberty Counsel is a nonprofit religious civil liberties education and legal defense organization dedicated to preserve religious freedom. Established in 1989, Liberty Counsel's charter is to provide information on First Amendment religious rights, and pro bono legal defense to defend those rights. Liberty Counsel's efforts reach nationwide to protect our religious civil liberties. Liberty Counsel defends the rights of all citizens and organizations to equal access to public facilities for peaceful meetings, conferences, and assemblies.

The **Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.9 million members in over 40,000 local churches. **The Ethics and Religious Liberty Commission** is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. *Amicus* produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. *Amicus* also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. *Amicus* frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

The **North American Mission Board of the Southern Baptist Convention** is the agency responsible for mission work, church planting, and evangelism in the United States. Together with its ministry partners, NAMB starts more than 1400 churches per year, many of whom are started in school facilities and could be directly affected by the issue in this case.